IN THE COURT OF APPEAL OF MALAYSIA

Coram: Hamid Sultan Abu Backer, JCA; Dr. Badariah Sahamid, JCA; Mary Lim, JCA

Bennett Subash Peter v Bon Ton Sdn Bhd

Citation: [2018] MYCA 271 **Suit Number:** Civil Appeal No. K-02(A)-1837-09/2017

Date of Judgment: 09 August 2018

Employment law – Termination of employment during probation – Jurisprudence relating to judicial review and termination of employment during probation period

JUDGMENT

[1] The appellant appeals against the decision of the High Court which quashed the decision of the Industrial Court. The decision of the Industrial Court was in favour of the appellant.

[2] The facts of the case are quite straight forward. The law is also well settled. However, the learned High Court judge chose to interfere in the decision of the Industrial Court on a matter related to findings of fact. After hearing the appellant and respondent, we took the view that the appeal must be allowed and the decision of the High Court must be set aside *in limine*.

Brief Facts

[3] The appellant was employed as a manager by the respondent at a salary of RM10,000.00 per month. The probation was for a period of 3 months. There was no misconduct on the part of the appellant in his work assignment though there was evidence to suggest that some of the staff were not happy with the way he managed them. The respondent terminated the employment during the probation period.

[4] The Industrial Court found that the appellant was dismissed without just cause and excuse and awarded a sum of RM90,000.00. The Industrial Court's finding was summarised by the learned High Court judge as follows:

"a. the First Respondent was contractually terminated during the duration of his probation;

b. there was no effective prior oral or written warnings given to the First Respondent that he was

in real danger of being terminated prior to the actual event, and nor [sic] was any convincing reason whatsoever advanced for his dismissal;

c. there was no allegation of non-performance or poor performance;

d. the allegations of misconduct put forward at the trial in the Industrial Court were proved unsubstantiated;

e. there was not an iota of cogent or convincing evidence that could have rendered the Applicant's action justifiable in the eyes of equity and good conscience;

f. the dismissal of the First Respondent by the Applicant was arbitrary and capricious and actuated by bad labour practice; and

g. the First Respondent was dismissed without just cause and excuse."

[5] The Memorandum of Appeal of the appellant reads as follows:

"1. That the Learned Judge erred in disregarding the detailed finding of facts made by the Industrial Court which had gone on to conclude that "there was not an iota of cogent or convincing evidence that could have rendered the company's action justifiable in the eyes of equity and good conscience".

2. That the Learned Judge erred when he failed to appreciate that the Company had indeed put forward reasons for the Claimant's dismissal, which reasons were analysed by the Industrial Court and found to be unsubstantiated.

3. The Learned Judge erred in failing to appreciate or give consideration to the Industrial Court's observation of how material witnesses were not produced at trial so as to lend credence to the Company's assertions.

4. The Learned Judge erred when he departed from the findings made by the Industrial Court that there was no just cause and excuse for the Claimant's dismissal, but substituted the same with his own findings instead.

5. In the circumstances, the Learned Judge had erred in law and in fact in quashing the decision of the Industrial Court, which decision was made after hearing witnesses and scrutinizing the documentary evidence first-hand."

Jurisprudence related to judicial review and termination of employment during the probation period

[6] It is now well established that an application for judicial review can succeed as of right if the inferior tribunal was in breach of Constitutional safeguards or statutory safeguards or breach of the Constitution or statute. However, when it relates to facts and evidence or cases which we often say as 'fact centric', the findings of fact of the inferior tribunal will not be a subject matter of appellate

scrutiny unless the applicant seeking review can satisfy the court the decision suffers from (a) illegality; (b) irrationality; and (c) procedural impropriety. In certain cases, the concept of proportionality. In **Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors** [2007] 5 MLJ 441, Hamid Sultan bin Abu Backer JC (as he then was) observed:

> "[27] One of the leading cases which expounds the traditional doctrine of judicial review is the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, where Lord Diplock set out the three criteria for review and they are: a) illegality; (b) irrationality; and (c) procedural impropriety and also set out the ground work for the fourth which was termed as proportionality. Lord Diplock expounded that: (i) Illegality means the decision maker must understand directly the law that regulates his decision making power and must give effect to it; (ii) Irrationality, his Lordship says, can be succinctly referred to as *Wednesbury* unreasonableness in reliance with the case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation*. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided on could have arrived at it; (iii) Procedural impropriety covers not only a failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision, but also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice; (iv) Proportionality has been used as a head of judicial review in cases where the sanction or punishment meted out is altogether excessive and out of all proportion to the occasion (see for eg *R v Barnesley MBC, Ex parte Hook* [1976] 1 WLR 1052; *Wheeler v Leicester City Council* [1985] AC 1054). This requires public authorities to maintain a sense of proportion between the objectives pursued by them and the means they employ to achieve such objectives, so that their actions do not unnecessarily intrude on individual rights in the pursuit of such objectives but only so far as is necessary to preserve public interest.
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> [28] There are number of Malaysian cases, where the above principles were discussed, adopted and/or elaborated. Some of them are as follows: (i) *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; (ii) *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; (iii) *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; (iv) *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487; (v) *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481."

[7] The law on judicial review in Malaysia has developed in leaps and bounds. The court is said to have the powers to scrutinize the decision not only for process but also for substance to determine the reasonableness of the decision. [See **Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd** [2010] 6 MLJ 1; **Ketua Pengarah Hasil Dalam negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor** [2017] 1 MLJ 563; [2017] 2 CLJ 1; **Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors** [2014] 4 MLJ 765; **Abu Bakar bin Salleh & Ors v Langkasuka Resort Sdn Bhd & Anor** [2018] 1 MLJ 248].

[8] The concept of reasonableness flows through in all cases of judicial review. The test to succeed on reasonableness is high. For the appellate court to dwell on the issue of reasonableness, the applicant must demonstrate the decision of the inferior tribunal was so outrageous and it was also in defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question would have arrived at that conclusion. [See **Md Nor bin Kassim v Malayan Banking Bhd** [2017] 4 MLJ 71]. Thus, the test to intervene in the decision of a tribunal is extremely high when it is contrasted to the decision of a trial court in civil cases [emphasis added].

[9] Whether it is a permanent employee or one on probation, industrial jurisprudence does not permit arbitrary reasons for dismissal. The reasons for dismissal must be *bona fide*. The *bona fide* test need not be objective. It all depends on the facts and circumstances of the case. An honest reason as well as mutual agreement may be sufficient. A mutual agreement of termination based on lack of *bona fide* may not suffice to say there was indeed a just cause and excuse for dismissal. Industrial jurisprudence generally leans towards the employee as opposed to the employer. This biasness is one related to common sense as the employer and employee are not often seen to have equal bargaining powers. In **Khaliah Abbas v Pesaka Capital Corporation S/B** [1997] 3 CLJ 827, the Court of Appeal held:

> "[1] An employee on probation enjoys the same rights 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 thus essential in his dismissal. If the dismissal is found to be a colourable exercise of the power to dismiss or a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and set aside such dismissal."

[10] The well known author C.P. Mills in the book titled 'Industrial disputes Law in Malaysia', 2nd edition at page 111, observes:

> "The Industrial Court has held that employment of a person on probation does not give the employer a right to terminate the contract at his absolute discretion. Even at common law the employer's right to determine the contract during the probationary period depended on the employer being *reasonably* satisfied as to the unsuitability of the employee. That is to say, the employer's decision should be made bona fide, not arbitrarily or capriciously. That principle was applied in *Pakir Abdul J alii v. Syarikat Shell Refinery Co. (F. of M.) Bhd.* (Award No. 20/74, 22 April 1974) but with a result that appears to fall short of the standard of equity and good conscience which the Act prescribes for the Court's decisions.
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> In the *Pakir Case,* a medical report obtained by the employer certified the workman unfit for employment, but other medical evidence was to the effect that the man's condition was normal. Although the Court expressed "some doubt" over the pre-employment medical report, it refused to hold that the employer had acted unjustly in terminating the employment:-
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> > ... the company accepted the verdict of its doctor as to the claimant's fitness and its decision was apparently made in good faith."

[11] Learned authors Nallini Pathmanathan, Siva Kanagasabai and Selvamalar Alagaratnam in the book titled 'Law of Dismissal' at page 204-205 say:

> "During the probation period, a probationer is being tested for his suitability for permanent employment. An employer has the prerogative to terminate the services of a probationer if the employer is satisfied that the probationer is not suitable for permanent employment. In the same vein, the probationer has a legitimate expectation that he will be confirmed if he proves to the satisfaction of the employer to be a fit and proper person for the appointment. Having invested his time and energy, and forgone the opportunity to establish himself elsewhere during the probationary period, it would be highly unjust if the employer can at his own pleasure and will terminate the probationer's employment without any genuine consideration being given to the latter's suitability for regular employment with the former.
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> In *Radiant Visions Sdn Bhd v. Donald Wayne Dickman* [2003] 1 ILR 42, the Industrial Court, in coming to its decision on a probationer's dismissal on the ground of poor performance said:
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> > "The question for the Industrial tribunal is: have the employers shown that they took reasonable steps to maintain appraisal of the probationer throughout the period of probation, giving guidance by advice or warning when such was likely to be useful or fair; and that an appropriate officer made an honest effort to determine whether the probationer came up to the required standard, having informed himself of the appraisals made by supervising officers and any other facts recorded about the probationer."
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> > "If this procedure is followed, it is only if the officer responsible for deciding upon selection of probationers then arrives at a decision which no reasonable assessment could dictate, that an industrial tribunal should hold the dismissal to be unfair."
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> ***6.13.5.1 Dismissal during probationary period***
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> The general rule is that the dismissal must be premised on good faith and for good reasons. Dismissals before the expiry of the probationary period have been held by the Industrial Court to be unfair. The probation period was after all fixed and determined in advance by the company. This would accordingly entitle the probationer to have the full benefit of the probationary period for his work to be assessed adequately. The Industrial Court has gone so far as to state that the company should in certain circumstances extend the period of probation and render the appropriate assistance to enable the probationer to attain the required standards.
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> The High Court in the case of *Sulnayah Mohd Isa v. Sekolah Kanak-kanak Pekak* [1999] 6 CLJ 234, made the following observation:
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> > " ... an employee cannot be terminated by the employer during the currency of his probationary period. However, there is an exception to the rule, i.e. the employee can be terminated if he commits an act of misconduct for which reason even the services of a confirmed employee can be terminated."

> This case makes it clear that an employee can be dismissed during the tenure of his probation on the grounds of misconduct. The Court was of the view that premature termination for reasons other than misconduct would be deemed unjust."

[12] We have read the appeal records and the able submission of the appellant as well as the submissions of learned counsel for the respondent. We found that the respondent's submission had no merits. This is not a fit and proper case for the High Court to intervene when the Industrial Court has fairly and properly taken into consideration, the evidence, all the material facts as well as the law before arriving at the conscionable decision alluded to earlier in this judgment which any reasonable tribunal, similarly appraised of the facts will come to the same conclusion. The decision of the Industrial Court in all aspects cannot be said to be perverse as it was supported by evidence as well as the law. [See **Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers** [1991] 1 CLJ (Rep) 159].

[13] For reasons stated above, we allowed the appeal with costs of RM10,000.00 subject to allocatur. The deposit to be refunded.

We hereby ordered so.

Dated: 9 August 2018

sgd

DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER
Judge
Court of Appeal
Malaysia

COUNSEL

For the Appellant: Mr. Bennett Subash Peter, 17, Taman Sri Taman, Off Jalan Penarak, Kuah, Langkawi, Kedah 07000

For the Respondent: Puan Siti Rafidah binti Abdul Raof [with Puan Nurfarhana binti Fadzil], Messrs. Aswandi Hashim & Co, No. 9, 1st and 2nd Floor, Kompleks Perniagaan, Sultan Abdul Hamid, Persiaran Sultan Abdul Hamid, 05050 Alor Setar, Kedah Darul Aman

JUDGMENTS REFERRED TO:

Abu Bakar bin Salleh & Ors v Langkasuka Resort Sdn Bhd & Anor [2018] 1 MLJ 248

Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors [2007] 5 MLJ 441

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 CLJ (Rep) 159

Ketua Pengarah Hasil Dalam negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563; [2017] 2 CLJ 1

Khaliah Abbas v Pesaka Capital Corporation S/B [1997] 3 CLJ 827

Md Nor bin Kassim v Malayan Banking Bhd [2017] 4 MLJ 71

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1

Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765