

INDUSTRIAL COURT OF MALAYSIA

[CASE NO: 19/4-1326/12]

BETWEEN

TAN TIAN TAY

... THE CLAIMANT

AND

SOMEDICO SDN BHD

... THE COMPANY

AWARD NO. 364 OF 2015

Before : **Y.A. PUAN HAPIPAH BINTI MONEL**
CHAIRMAN (Sitting Alone)

Venue : Industrial Court Malaysia, Kuala Lumpur.

Date of Reference : 06.09.2012

Dates of Mention : 02.11.2012, 11,12,2012, 06.02.2013, 06.03.2013,
11.04.2013.

Dates of Hearing : 17.09.2013, 21.11.2012.

Representation : *For the claimant - Steven CF Wong (Sharen Rosli with him); M/s Arifin & Partners*

For the company- Leonard Yeoh (M F Lim with him); M/s Tay & Partners

REFERENCE:

This is a reference under section 20(3) of the Industrial Relations Act 1967 arising out of the dismissal of **TAN TIAN TAY** (hereinafter referred to as “the Claimant”) by **SOMEDICO SDN. BHD** (hereinafter referred to as “the Company”) on the **29 January 2010**.

AWARD

Facts

The Claimant joined the Company on 23rd November 1992 and was confirmed on 1st April 1993. The Claimant was promoted to the position of Sales Supervisor in the Pharmaceutical Division (Hospital Department) with effect from 1st October 1994 pursuant to the letter dated 21st October 1994.

The Claimant was dismissed by the Company with effect 29th January 2010 and that the Claimant's last drawn basic salary was RM5,887.00 per month. The Company states that there was no fixed sum for the Claimant's entitlement to medical and hospitalization benefits.

The letter of dismissal which was dated 29th January 2010 (page 58 of COB1) as follows:

“Reference is made to the memo of November 20th 2009. You have been cautioned about your poor performance both in terms of sales and conduct of job responsibilities.

The management has also set out specific improvement goals for you to achieve.

Upon expiry of time period given to you to show improvements, you did not demonstrate tangible results against the set goals.

So, since the position requires performance, and you have consistently failed to deliver the expected performance. It is with much regret that we cannot maintain you in your position. Your service is hereby terminated on cause of non-performance.”

The Law

In the case of *Grand Banks Yacht Sdn. Bhd v. Komander (B) Teng Tiung Sue* [2002] 1 ILR 802 (Tab C page 804 of the Company Bundle of Authorities) it was held that:

“The function of the Industrial Court (the Court) in a reference under s. 20 of the Act had been stated by the Federal Court in the case of Goon Kwee Phoy v. J&P Coats (M) Bhd [1981] 2 MLJ 128, where at p. 136, Raja Azlan Shah CJ elaborated as follows:

... where representations are made and 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 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 the Court or the High Court cannot go into another reason nor relied on the employer or find one for it.

It is a basic principle of industrial relations jurisprudence that in a dismissal case where poor performance is alleged, the employer must produce convincing and cogent evidence that the employee had been incapable of performing his duties for which he had been dismissed. The burden of proof lies on the employer on a balance of probabilities to adduce evidence that the workman was dismissed for just cause and excuse.

The requirement of bona fide is an essential element to any dismissal. If the dismissal is found to be colourable exercise of the management 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.”

Evaluation of Evidence and Findings

The two (2) alleged poor performance are with regards to:

- d) the sales targets for the year 2007/2008, year 2008/2008 and October 2009; and
- e) the Company’s letter to the Claimant dated 29th September 2000 (page 6 of COB1); the Company’s letter to the Claimant dated 28th November 2003 (pages 20 and 21 of CLB1) and the Company’s letter in response to the Claimant’s grouse which is found at page 25 of CLB1 dated 8th November 2004.

The Claimant’s Performance prior to Finance Year 2007/2008

Financial Years 2005/06 and 2006/2007

It is not disputed that the Company’s financial year ends in September every year. Henceforth, for the year 2007/2008, the financial year is that from 1st October 2007 till 30th September 2008 and for the year 2008/2009, financial year is that from 1st October 2008 till 30th September 2009.

The Claimant’s performance for the year 2005/2006 at pages 29 and 30 of CLB-1, shows that his performance was “Very Good”. Likewise, the Claimant’s performance for the year 2006/2007 at page 31 of CLB1, shows that his performance was “Very Good”. In fact, if

reference is made to page 56 of CLB1, it can be seen that the Claimant achieved an overall sales target of 105% for the year 2006/2007 under the team “PHARMA II”.

The Claimant’s performance for the first quarter of Financial Year 2007/2008 that is from 1st December 2007 at page 58 of CLB1 shows that the Claimant’s achieved an overall sales target for 119% under the team ‘PHARMA II’ with 4 persons in his team.

The Claimant’s performance for the month of January 2008 that is 31st January 2008 till 31st January 2008 at page 60 of CLB1, shows that the Claimant’s achieved an overall sales target of 104% under the team “PHARMA II” with 4 persons in his team, just prior to the compartmentalization with effect from 1st February 2008.

This clearly shows that right up until the time of compartmentalization, the Claimant was performing his part of his job – in fact achieving over and above his sales target.

The Claimant has in questions 31 to 37 of his witness statement testified the following outlining the reasons for the decline in the sales target from 1st February 2008 which are as follows:

31Q: Which department of the Company did you work for in your years working for the Company?

A: In 1992 – 1993, I worked in Ethical Division.

Please refer to page 38 Tab 4 of the Claimant’s Bundle of Documents.

Starting from 1993/1994 to 2007/2008, I worked with the Pharmaceutical Division (Dept-11).

Please refer to page 9 Tab 3, page 39-59 of the Claimant's Bundle of Documents.

According to Tab 4 of the Employee's Bundle of Documents changes were made by the Company and as a result of which, I was transferred in 2007/2008 to Rheo-1.

Please refer to page 60-65 Tab 4 of the Claimant's Bundle of Documents.

32Q: Did you achieve any of your sales target when you were needed to supervise the Ethical Division and Pharmaceutical Division (Dept-II) from 1993/1994 till 2007/2008?

A: Yes.

33Q: Can you explain further?

A: I worked individually in Ethical Division for one year from the total of nearly 18 years of my service and I managed to achieve 109% of my sales target when I was in the division.

When I was in Pharmaceutical Division (dept II), I was the supervisor of my team. Most of the time, my team and I managed to achieve more than 100% of our sales target. In fact in my final quarter with them that is the 1st quarter of 2007/2008, we managed to achieve 119% of the said quarter's sales target.

Please refer to pages 38-58 Tab 4 of the Claimant's Bundle of Documents.

Unfortunately, because of the Company's decision to compartmentalized, I was moved from the Pharmaceutical Division (Dept II) to Rheo-1 and that was the reason for the drop in terms of percentage of the sales achieved target.

Please refer to page 60-65 Tab 4 of the Claimant's Bundle of Documents.

34Q: Was there any difference between the Pharmaceutical Division and the new division, Rheo-1?

A: Yes.

35Q: Can you explain further why you said that?

A: By virtue of the compartmentalization, the Company had re-arranged the product which were familiar to me for other divisions of the Company to sell instead. Previously, I was in charge of selling products from a full range of pharmaceutical products. Therefore, I knew which products were in high demand and which were not. Unfortunately, when I was in charge of Rheo-1, there were limited range of products and there were also new products where other competitors were already in the market. These competitors already had a head-start in those products which made my situation worst.

Please refer to page 74-87 Tab 6 and page 92-105 Tab 8 of the Claimant Bundle of Documents.

Furthermore, the number of persons in my team was reduced from 4 to 3.

Please refer to page 88-91 Tab 7 of the Claimant's Bundle of Documents.

Moreover, the areas for my team and I to sell the products were changed.

Please refer to page 88-91 Tab 7 of the Employee's Bundle of Documents.

Because of the compartmentalization, my sales target dropped from 119% on the 1st quarter of 2007/2008 when I was with the Pharmaceutical Division to 62% on the next three (3) quarters when I was transferred to Rheo-1.

Please refer to page 58 & 60 Tab 4 of the Claimant's Bundle of Documents.

36Q: From the sales figure, why did your sales drops dramatically?

A: It was due to the compartmentalization.

37Q: Can you explain why?

A: Prior to the compartmentalization of the departments (from Dept-II to Rheo-1) I had more products to sell and I concentrated more on the products which were saleable. After compartmentalization, I was given new products which the Company in itself was not strong at.

It takes time to build a product brand. Selling a pharmaceutical product needs time to get the results. You need to do advertisement. You need to do public survey. You need to present the products so that the customers know about them.

'Training' is defined at page 3 of CLB1 as part at the Claimant's letter of employment dated 19th October 1992 where the Company has explained that the word 'Training' meant undergoing an official training course on the products that the Claimant was to sell, undergoing a management program, attending international seminars related to the Claimant's work and/or accompanying the Company's customers to foreign scientific seminars to enhance the Claimant's relationship with the Company's customer and to increase the Claimant's knowledge.

The Claimant was never given any official training course on the products that the Claimant was to sell that is with regards to 'RHEO-1' before or after the compartmentalization of the Company.

All that the Claimant was given training as per questions 19 and 20 of the Company's witness statement by Lim Teng Chyuan was that of 'Effective Sales Management Workshop' and 'Building Area Sales Excellence Training' which has nothing to do whatsoever with any official training course on the products that the Claimant was to sell that is with regards to 'RHEO-1'.

Therefore, the training given was non-existence when compartmentalization took place on 1st February 2008. So when the non-performance came about, the Company failed in providing basic training that is an official training course on the products that the Claimant was to sell that is with regards to 'RHEO-1'. The Company as any employer, should as a matter of prudence, provide the Claimant, as an employee who is new to a product with necessary training.

Despite the Claimant not achieving the sales target for the sales targets for the year 2007/2008, year 2008/2009 and October 2009 (which effectively was from 1st February 2008 till 31st October 2009), the Company still did nothing that is it failed to provide basic training to the Claimant that is an official training course on the products that the Claimant was to sell that is with regards to 'RHEO-1'.

The Company should, in fact as a matter of prudence, provided the Claimant whose sales target was deteriorating with the necessary training – that is as per the Claimant’s letter of employment dated 19th October 1992 which was an official training course on the products that the Claimant was to sell that is with regards to ‘RHEO-1’.

There was none unfortunately and instead what the Company did was to call the Claimant for a ‘RHEO-1’ review 27th January 2010 at 4 pm as per page 55 of COB1 and at the review requested the Claimant to come up with an ‘action plan’ on the very next day, that is on 28th January 2010.

Henceforth, instead of the Company providing training or counselling to the Claimant, the Company sacked the Claimant by issuing the letter of dismissal without just cause and excuse on 29th January 2010 for the unavailability to produce an ‘action plan’.

The Claimant’s testimony in questions 21 to 30 at his witness statement explains this issue victimization.

Letter dated 29th September 2000

21Q: Now, please refer to page 5 of the COB, did you receive this letter dated 29th September 2009?

A: No.

22Q: So you never saw this letter before?

A: Yes, I never saw this letter before.

23Q: Is that your signature at the bottom of the letter?

A: No.

Letter dated 28th November 2003

24Q: What was this letter dated 28th November 2008 found at page 20 & 21 Tab 3 at the CLB about?

A: It was a reminder as to a discussion between Mr Wong Wee Siak and myself on 21st November 2003. I spoke to him regarding my appraisal letter dated 31st October 2003 as I was expecting better grading for having achieved 102.96% of the sales target for the year (2002/2003).

In the following year, a memo was given by the Company's Chairman on 29th March 2004 which is found at page 22 Tab 3 of the CLB in regards to my achieved sales target. The Company gave my team and myself, a RM500.00 as a taken of appreciation.

Please refer to page 22 Tab 3 of the CLB.

Letter dated 8th November 2004

25Q: Why did you receive a letter from the Company dated 8th November 2004 found at page 25 Tab 3 of the CLB?

A: It was a reply to my letter dated 5th November 2004 found at page 24 Tab 3 of the CLB.

26Q: Can you explain further?

A: I wrote a letter dated 5th November 2004 as a reply to my appraisal dated 2nd November 2004. I was not satisfied with my grading as it affected my salary increment. Despite making my team happy under my supervisor, my team (Dept II) had achieved a target sales of 109.51% for the current year (2003/2004), It

was the first time that I had put in writing, my disappointment towards the Company after 12 years of service.

Relevance of the 3 letters

27Q: Do you agree with the contents of letter dated 28th November 2003 and 8th November 2004 found at pages 20, 21 & 25 Tab 3 of the CLB?

A: No.

28Q: Can you explain further?

A: There should be no issue as to my lack of discipline and management on my part. The Company had never given me any warning letter pertaining to my discipline and management until my discussion on 21st November 2003. The Company was also aware that I had to meet clients before I came back to the office. Therefore, the issue of punctuality should not be raised by the Company. As a supervisor, I had made sure that my teamwork managed to achieve our sales target. Most of the time, my team managed to achieve more than 100% of the sales target. I believe that my proper supervising, communication, planning, commitment and proper attitude towards my team and the Company. I had managed to drive my team to achieve the Company's target.

Please refer to page 20 Tab 3 of the CLB.

29Q: In your opinion are these 3 letters mentioned above relevant to the termination of your employment?

A: No.

30Q: Why do you say so?

A: The reason is simple. The three (3) letters referred to by the Company in its letter of termination dated 29th January 2010 found at page 36 of Tab of the CLB, were issued in the years 2000, 2003 and 2004 whereas the letter of termination was issued 10 years, 7 years and 6 years later.

Further, the Company congratulated me for my achievement and I was praised and/or graded Good and/or Very Good and/or Excellent by the Company *via* its letter to me dated 21st October 1993, 21st October 1994, 16th October 1995, 14th October 1996, 20th October 1997, 14th October 1999, 6th November 2001, 31st October 2003, 29th March 2004, 2nd November 2004, 17th October 2005, 24th October 2005, 30th October 2006 and 12th October 2007 respectively.

Please refer to page 7 - 31 Tab 3 of the CLB.

So, the Company was just merely finding an excuse to terminate me on 29th January 2010.

Conclusion

There was victimization of the Claimant by relying on a letter dated 29th September 2000 which the Claimant never received in sacking him on 29th January 2010.

There was a victimization of the Claimant by relying on a letter dated 28th November 2003 in sacking him. There was a victimization of the Claimant by relying on a letter dated 8th November 2009 in sacking him.

No reasonable time allowed for the Claimant to attain his sales target taking into account that the warning letter was only issued on 20th November 2009 when the quarterly results for the next quarter after 20th November 2009 ends on 30th March 2010.

The compartmentalization of the Company by transferring the Claimant from 'PHARMA-II' to 'RHEO-1' caused the reduction in the sales achieved by the Claimant. There wasn't any training provided by the Company to the Claimant for the 'RHEO-1' product when compartmentalization occurred.

It wasn't fair to ask for the presence of the Claimant in meeting on 27th January 2010 for a sales review and instead of a sales review requested the Claimant to come up with an 'action plan' instead on the very next day, 28th January 2010.

It wasn't fair to ask for the presence of the Claimant in a meeting on 27th January 2010 for a sales review and instead of a sales review requested the Claimant to come up with an 'action plan' when in the warning notice of 20th November 2009 (page 34 of CLB1) and the electronic mail that scheduled for the sales review sent out on 14th January 2010 (page 55 of COB1) mentioned no such request and because of the Claimant's inability to produce an 'action plan', the Claimant was dismissed.

Therefore, in conclusion, taking into account the totality of the evidence adduced by both parties and bearing in mind s. 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and the substantial merits of the case without regard to technicalities

and legal form, this Court finds the dismissal of the Claimant's were without just cause or excuse.

Remedy

This court is of the view that reinstatement of the Claimant in the Company is not the appropriate remedy in the circumstances and facts of this case. The reinstatement of the Claimant in this case is not conducive to industrial harmony.

In the case of *Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr. James Alfred (Sabah) & Anor* [2000] 3 CLJ 758 at p. 766, the Court of Appeal decided *inter alia* as follows:

"In industrial law, the usual remedy for unjustified dismissal is an order of reinstatement. It is only in rare cases that reinstatement is refused. For example, as here, where the relationship between the parties had broken down so badly that it would not be conducive to industrial harmony to return the workman to his place of work. In such a case, the Industrial Court may award monetary compensation. Such an award is usually in two parts. First, there is the usual award for the arrears of wages, or backwages, as it is sometimes called. It is to compensate the workman for the period that he has been unemployed because of the unjustified act of dismissal. Second, there is an award of compensation in lieu of reinstatement."

The Claimant joined the Company on 23rd November 1992. He was terminated on 29th January 2010. His last drawn basic salary was RM5,887.00 per month. The Claimant had worked for the Company for 17 years.

a) **Backwages**

$$\text{RM5,887.00} \times 24 \text{ months} = \text{RM141,288.00}$$

- b) Compensation in lieu of reinstatement ie, one months salary for every completed year of service.

$$\text{RM5,887.00} \times 17 = \text{RM100,079.00}$$

Final Order

The court orders the Company to pay the Claimant the sum of RM241,367.00 less statutory deductions, if any, through the Claimant's solicitors, Messrs. Arifin & Partners, within 30 days from the date of this Award.

HANDED DOWN AND DATED THIS 2nd APRIL 2015

(HAIPAH BINTI MONEL)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR