ASSOCIATED AIR-PAK INDUSTRIAL SDN. BHD. v. CHIN YOON LOY

INDUSTRIAL COURT, KUALA LUMPUR
CHAIRMAN: TAN KIM SIONG
[CASE NO. 4/4-304/90 (16 OCTOBER 1989)]
5 & 30 MARCH 1992

[Preliminary objection disallowed; reference be fixed for hearing.]

AWARD NO. 70 OF 1992 [2 APRIL 1992]

AWARD The issue involves the dismissal of the claimant by the company as its managing director. The claimant avers that he was dismissed without just cause or excuse.

At the outset of the proceedings the learned counsel for the company raised a preliminary jurisdictional objection:

That this court has no jurisdiction to hear this dispute as the claimant, being the managing director of the company is not a workman within the meaning of the Industrial Relations Act 1967.

The following facts are on record and are not in dispute.

The claimant was elected by the shareholders of the company at a general meeting to be one of its directors in 1979. The claimant was appointed managing director of the company at a salary of $1,500 per month (Exhibit CL2) dated 29 July 1979. The remuneration of the claimant as the managing director was further increased to $2,500 per month at a Board meeting dated 27 June 1982 (See Exhibit CL3).

By a letter of appointment the claimant's remuneration was again increased to $5,000 per month, a bonus of $10,000 plus other perks (see Exhibit Our Ref: MEM/AKY/ni Date: 31 May 1986 CL13) which is reproduced below:

Mr. Chin Yoon Loy, c/o Associated Air-Pak Industries Sdn. Bhd., 22, Jalan Kilang 3, Kawasan MIEL, First Garden, 30100 Ipoh.

Dear Mr. Chin, Further to the discussion with the members of our Board of Directors on 26 January 1986, we hereby confirm your continued appointment as Managing Director with the following terms:

1. Remuneration of $5,000 with effect from 1 January 1986. 2. Bonus of $10,000 (two months of new rate) for the year just ended. 3. All expenditure incurred for the continued use of your car shall be borne by the company. 4. Personal entertainment expenses at your discretion shall be borne by the company.

We sincerely hope that these terms are agreeable to you. Further we take this opportunity to commend you on your excellent performance.

Yours faithfully,

Sgd. Jaafar bin Chik Chairman.

The claimant's services with the company were terminated by a letter dated 30 September 1989 with immediate effect (see Exhibit CL16). The letter of termination reads as follows:

Date: 30 September 1989

Mr. Chin Yoon Loy 21, Regat Intan Intan Park 31650 Ipoh

Dear Mr. Chin Yoon Loy,

Re: Removal as Managing Director

I regret to inform you that pursuant to the Emergency Meeting of the Board of Directors on Saturday, 30 September 1989, it was resolved that your appointment as Managing Director of the company be revoked with immediate effect.

Kindly return all company's effects in your possession immediately.

On behalf of the Board of Directors, I thank you for your past services to the company and wish you every success in your future endeavours.

Thank you.

Yours faithfully,

Sgd. Jaafar bin Chik Chairman Associated Air-Pak Industries Sdn. Bhd.

This was subsequently followed by a resolution of the Board of Directors' Meeting revoking the claimant's appointment as the managing di- rector of the company on 15 October 1989. On 12 November 1989 at an Emergency General Meeting the claimant was not re-elected by the shareholders.

On 16 October 1989 the claimant filed his representations of dismissal in writing at the Director- General's Office under s. 20(1) of the IRA 1967. It is obvious the Director General was unsuccessful to settle the matter by conciliation and the claimant's representations were subsequently referred to this court by the Honourable Minister of Human Resources for an award (s. 20(3) of the Act).

To determine the preliminary issue it is necessary to examine s. 20(1) of the Act as a starting point. That subsection reads:

20(1) Where a workman, irrespective of whether he is a member of a trade union of workman or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment, the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

The word in subsection 20(1) relevant to the preliminary issue under consideration is the definition of workman. Only a workman who considers he has been dismissed, may within thirty days of his dismissal make representation.

The company disputed the claimant's averment in its statement in reply and contended that the claimant was a managing director of the company and at the time of dismissal the defacto and dejure managing director in the company. Hence the claimant was not a workman within the meaning of a workman as defined in s. 2 of the Act.

To establish its case for the purpose of the objection the company called two witnesses, the Chairman of the Board of Directors cum Task Force Committee and its Technical Director. The Technical Director COW1 is now its Managing Director who testified for the company and tendered as exhibit numerous minutes of the Board Meetings. From his evidence the material points relevant for the consideration on the preliminary issues are:

(i) Claimant was totally responsible for the running of the company. (ii) All along there was one working director till 1986. (iii) Claimant was to select and make decision on what to buy. (iv) Employment and dismissal of staff, the entire power was with him. (v) From time to time claimant visited countries. He could go to any of these countries on his own free will. He could choose what mode of transport he would use and determine his allowances.

When his testimony was challenged under crossexamination, he wavered and contradicted himself on some of his evidence as against the minutes of the Board Meetings which were tendered as exhibits. For example Exhibit CL1 clearly shows there were more than one

director in the company even in 1979. Evidence adduced under cross examination also indicated that:

(1) Claimant took instruction from the Board of Directors and submitted regular reports on his activities in the company to the Board. (2) Claimant as managing director had to report to the Executive Chairman of the Management Committee. (3) Claimant had to follow instruction from the Board of Directors on his job functions. It was on the minutes of the Board that he was directed to be on the road 100% when business was bad. (4) Claimant's salary was reviewed by the sub-committee and the Board determined his salary and bonuses. (5) Claimant was appointed by a letter of appointment with the terms of his appointment. (6) Claimant was dismissed by a letter from the Board.

The company's other witness is COW2 Jaffar bin Chik. He was the Chairman of the Board of Directors. He gave evidence that there was an Executive Committee or sub-committee to deliberate and recommend to the Board of Directors for decision and the Managing Director was to implement the policies. The Executive Committee was made up of himself as Executive Chairman, the claimant and COW1 were the other two members. The Executive Chairman was to oversee all aspects of the groups activities and to guide the present management. The Managing Director and the Executive Director shall both report to the Executive Chairman. The Executive Chairman shall provide the required leadership and set directions for the company, monitor performances and effect the necessary directives accordingly. He also explained the Organisational Chart which is a study of the Management and Organisation Structure. The chart clearly placed the Managing Director under the category of management. The witness however emphasized that the chart was merely a recommendation and was not implemented by the company (see Exhibit CL12).

Apart from the two witnesses who testified, it would appear both sides are relying on the minutes of the Board of Directors' Meetings to support their respective contentions as to whether the claimant was a workman.

His Lordship Seah (SCJ) in Inchcape Malaysia Holdings Bhd. v. R.B. Gray & Anor. [1985] 2 MLJ 297-318 (the Inchcape case) stated in his judgment:

In Dr. Dutt's case [1980] 1 MLJ 96/ [1981] 1 MLJ 115 the Federal Court held that the question whether a person was or was not a "workman" is a question of mixed fact and law and I agree with the view.

In order to come to a proper decision whether the claimant Chin Yoon Loy was or was not a workman in this dispute it has become necessary to examine the Inchcape [1984] 2 CLJ 77 case and cases decided after it. I shall begin with the definition.

The definition of "workman" in the Industrial Relations Act is as follows:

Workman means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

His Lordship Tun Salleh Abas, Lord President as he then was, in defining the word "workman" in the Inchcape case said:

Whilst a contract of employment is part of the definition, it does not follow that every person who is employed under a contract of employment or being an employee of another is a workman. To be a workman a person must be employed as a workman. If he is employed in other capacity he cannot be a workman. There can be no doubt that the relationship between

the appellant and the respondent by virtue of the contract of employment dated 25 June 1977 was that they were master and servant, or employer and employee. But this fact is neither here nor there, because the important criterion is the capacity or purpose for which the respondent was employed. The contract of employment in this case says that the respondent was employed as a director. Surely, common sense tells me that a director and a workman are poles apart and not synonymous. A director occupies a special position in the company and has different type of responsibilities from those of an ordinary employee of the company. By specifying in the contract that the respondent was employed as a director the parties to the contract must have intended that the respondent was not to be regarded as a workman. On this ground alone I could hold that the ruling by the Industrial Court was erroneous.

His Lordship Seah SCJ continued in the Inchcape [1984] 2 CLJ 77 case and said:

In considering this perennial question the Industrial Court must always bear in mind that they must be guided by the relevant definition clause contained in s. 2 of the Act. The definition clause itself presents some difficulty of construction because in my view the definition is not complete. There is therefore no real statutory definition of the word "workman" in the Act.

In the same judgment His Lordship Seah (SCJ) stated:

In my opinion, Parliament has advisedly made the definition vague leaving it to the Industrial Court initially and ultimately the High Court by way of proceedings for an Order of Prohibition or Certiorari to determine the extent of the question or meaning.

His Lordship Seah (SCJ) in another passage in the same judgment stated:

... the tendency of the Industrial Court would appear to give the word "workman" in a trade dispute a wide meaning unless there is something in the definition clause in the Act to limit or restrict such a construction. Indeed, such a limitation appears to be found in the definition of the phrase "contract of employment" where it is expressly provided that (a) the employer must agree to employ the person as a workman and (b) that person must also agree to serve his employer as a workman. I am therefore unable to accept the submission of learned counsel for the first respondent that I ought to give the word "workman" a wide meaning.

Having examined the definition of "workman" as defined in the Act and case law, I shall now analyse whether a Director in a company can come within the definition of "workman" in the Industrial Relations Act 1967.

In Industrial Court Award No. 233 of 1990 - Pelita Supermarket Sdn. Bhd. and Yeo Kiew Boh (the Pelita case), the issue was "whether the claimant a director of a company, working as an Accountant cum Administrative Manager in the same company is a workman." The Chairman of the court had this to say:

Before delving into the Inchcape case which was relied on by the company to support its contention that the claimant was not a workman, this court would reiterate a general objection made by Lord Halsbury in Quinn v. Leathem (HL) 1901 AC at p. 495:

... there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a code, whereas every lawyer must acknowledge that the law is not always logical at all.

The facts of Award 233/1990 are quite similar to the present case and they are as follows:

The company traversed the claimant's averment in its statement of reply and contended that the claimant was a Director of the company, a shareholder of 50,000 shares, attended all meetings of the Board of Directors, was the brain and will of the company and that at the material time he was dismissed, he was a working Director in the company. Incidentally the company had nine Directors.

In coming to its decision in the Pelita case, the Industrial Court relied on two tests:

(1) The control test; (2) The function test.

For the control test the court relied on the manner of dismissal of the claimant, supervision of the claimant's work and the contract of employment.

The Supreme Court in the case of Kuala Lumpur Mutual Fund Bhd. v. Bastian Lee & Anor. [1988] 2 MLJ referred to the Privy Council case of Australian Mutual Provident Fund Society v. Chaplin & Anor. (18 ALR 385) and stated:

It was held inter alia in allowing the appeal that the possession by an alleged employer of the power to control the manner of doing the work was a very important indication of a contract of service, perhaps the most important of such indicia.

Lord Morris of Borthy-y-Gest in Catherine Lee's case emphatically stated:

It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company.

For the foregoing reasons this court, finds that in accordance with law and in justice, common sense, equity and good conscience the claimant ought to be and is hereby held to be a workman as defined in s. 2 of the Act and a workman under s. 20(1) of the Act. A ruling to the contrary would be illusory, unrealistic and astigmatic.

There are sufficient facts on record to show control exercised by the Board of Directors over the claimant. CL16, inter alia, states your appointment as managing director of the company be revoked with immediate effect and also implied contract of employment between the company and the claimant for hire or reward.

Although the letter of appointment specifically appointed the claimant as the managing director of the company the label is not relevant. What is relevant is the job functions of the claimant. In Syarikat 3M Malaysia Sdn. Bhd. v. Nik Kamaruddin bin Ismail [1990] 1 MLJ 365, His Lordship Eusoff Chin J. (as he then was) held:

The court was inclined to think that the Industrial Court was not concerned with nomenclature or position held by the claimant, but was concerned to get the truth of the claimant's duties and functions in the company ...

The two roles played by the claimant first as a director and secondly as a managing director who attended every Board meeting and owned shares in the company do not make him the very brain and directing mind of the company. On the other hand documentary exhibits CL1-CL16 tendered in court clearly shows he is but the Chief Executive of the company. The Minutes of the Board shows:

(1) The set-up of the company, that is, Board of Directors, sub-committee, Task Force Committee, Management Committee and Management; (2) Claimant was not the only working director employed by the company till 1986, there were many others with different titles such as consultants, Executive, Chairman, Executive Director, etc., (3) Claimant took instructions from the Board of Directors as well as submitted regular written reports on almost everything he did; (4) Claimant as managing director was further subject to an

Executive Chairman who he had to report to; (5) The claimant as managing director needed approval and/or a mandate from the Board of Directors to purchase even trivial items, that is, T-shirts etc and even for sums amounting to $1,500 only; (6) Claimant had to account for any claims made by production of bills etc.; (7) Claimant followed instructions from the Board of Directors on his job functions, the minutes will show that his job functions was based on the discretion of the Board of Directors; (8) Claimant's salary was reviewed by the sub-committee who made recommendation to the Board who determined his salary and bonuses; (9) Richard Chong, a working director similar to claimant was clearly considered an employee; (10) Claimant was appointed by a letter of appointment stating the terms of his appointment; (11) Claimant was dismissed by a letter without prior notice; (12) Claimant was paid bonus.

In the case of Felami v. Nigerline (UK. Ltd. EAT 1977) it was held that :

Where a director of a company had been appointed a managing director with duties which included the effective management of all aspects of the company's affairs, he had discharged those duties and had received a regular salary from the company, he must for some purpose at least, be considered an employee of the company, even though he had no contract of service.

Finally I shall conclude by referring to a Supreme Court decision in Haji Sarip bin Hamid & Anor. v. Patco Malaysia Bhd. which upheld the ruling of Industrial Court Case 3/4: 117 of 1987. In allowing the Appeal Lee Hun Hoe CJ Borneo, as he then was, said:

This brought about the preliminary issue before the Industrial Court and subsequent appeal to the High Court. At p. 406 of Vol. 2 of the appeal record the Chairman of the Industrial Court set out the matter clearly when he said at the opening of his ruling:

This company at the very outset of the hearing raised a preliminary objection that the claimant was not a workman within the meaning of s. 20(1) of the Industrial Relations Act 1967.

In the course of his ruling he stated:

I am satisfied from the evidence before me and the agreement - (CO2) between the company and the claimant that the claimant was not the very brain and directing mind of the company. In the circumstances, I rule that the claimant as general manager of the company comes within the definition of 'workman' in the Industrial Relations Act 1967.

Upon the facts and reasons before the court I am satisfied that the claimant has established that at the time of his dismissal he was a workman as defined in s. 2 of the Act and a workman under s. 20(1) of the Act. The preliminary objection by the company is disallowed and I direct the reference be fixed for hearing as to the merits of the matter.