

INTERDATA TECHNOLOGIES (MALAYSIA) SDN BHD

a

v.

YAP CHENG HONG

INDUSTRIAL COURT, KUALA LUMPUR
SITI SALEHA SHEIKH ABU BAKAR
AWARD NO. 388 OF 2003 [CASE NO: 6/4 - 960/01]
20 MAY 2003

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DISMISSAL: *Redundancy - Company dismissed claimant following resignation of her superior - Whether claimant was made redundant - Whether dismissal justified*

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The claimant was employed as a secretary with the company before she was dismissed. She claimed that her dismissal was without just cause and excuse. The company alleged that her dismissal was justified on the grounds that: (1) the company had suffered losses; (2) the claimant had become redundant following the resignation of the company's expatriate managing director, one Mr Brimble; and (3) that the claimant failed to perform in the sales department she was transferred to.

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Held [for the claimant]:

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[1] The company failed to prove that there was a redundancy situation that led to the claimant's retrenchment. Although the company referred to the company's audited accounts to show the losses suffered by the company and that 39 employees were retrenched, no documentary evidence was adduced in relation to the said employees and their retrenchment. The company also failed to prove that the claimant's job functions had become redundant when its only reason for dismissing her was that Mr. Brimble had resigned from the company. Furthermore, no evidence was adduced to show that the company considered or carried out cost-cutting measures in facing its financial problems. It followed that the company failed to show that as a consequence of severe financial difficulties there was a necessity to restructure and to reorganise the company leading to the claimant's dismissal. (P 470 e-g)

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[2] The company failed to ensure fair industrial practice by giving the claimant notice of the retrenchment so that she could be prepared for the unemployment situation and to give her ample time to find suitable employment. The company also failed to comply with the LIFO principle in retrenching the claimant. (p 471 c-d)

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- a* [3] Assuming that the claimant was transferred to the sales department, it was clear that she was not warned orally or in writing about her performance. The company further failed to show any written appraisal of the claimant to prove her alleged poor performance and any evidence that she was given guidance and opportunity to improve her alleged poor performance.
- b* The company, therefore, failed to prove that the claimant was guilty of poor performance. (p 472 b-c)

[Dismissal without just cause and excuse; order for compensation in lieu of reinstatement.]

- c* **Award(s) referred to:**
Caleb Brett (M) Sdn. Bhd. Sarawak v Abdul Rahman bin Ahmad Sharkawi @ Abdul Rahman bin Sarkawi [1999] 2 ILR 1053 (Award No. 297 of 1991)
IE Project Sdn. Berhad v Tan Lee Seng [1987] 1 ILR 165 (Award No. 56 of 1987)
Nusantara Sakti Sdn Bhd v. Surindirjit Singh Atma Singh [2000] 2 ILR 294 (Award No. 413 of 2000)

- d* **Case(s) referred to:**
Koperasi Serbaguna Sanya Bhd. Sabah v. Dr. James Alfred (Sabah) & Anor [2000] 3 CLJ 758
Pipraich Sugar Mills v. Pipraich Sugar Mills Mazdur Union AIR 1957 SC 95
William Jacks & Co (M) Bhd v. S Balasingam [1997] 3 CLJ 235

- e* **Other Source(s) referred to:**
 Dunstan Ayadurai, *Industrial Relations in Malaysia Law and Practice*, 2 edn, p. 159
 For the claimant - Venu Nair; M/s Paul Cheah & Assocs
 For the company - B Mathew

- f*
- AWARD
(NO. 388 OF 2003)**

Introduction

- g* The dispute over the dismissal of the claimant by the company has been referred to the Industrial Court under s. 20 of the Industrial Relations Act 1967 by the honourable minister of human resources for an award.

These are the brief facts:

- h* The claimant was employed by the company as a secretary with effect from 7 August 1995 *vide* letter of appointment of even date (exh. "C1") and she was required to be on probation for six (6) months. She was assigned to the equipment, sales and servicing department and she reported to the department head, one Victor Gooi.

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By a letter of 1 March 1996 the claimant was confirmed in her position as secretary (exh. "C2") and with effect from 1 August 1997 her monthly salary of RM2,000 was increased to RM2,250. *a*

On Victor Gooi's leaving the company he was replaced by one Brimble, an expatriate, who besides heading the equipment, sales and servicing department was also the managing director. The claimant was then transferred to the post of secretary to the managing director and remained so for two years until Brimble resigned on 8 June 1999. *b*

Subsequently by a letter of 30 June 1999 (exh. "C4") the company terminated the claimant's employment with effect from 1 July 1999. For ease of reference the letter is reproduced below: *c*

IDT
INTER DATA TECHNOLOGIES (MALAYSIA) SDN BHD
Company No. 27082A

Date : 30 June 1999 *d*
Name : Ms Yap Cheng Hong
Emp. No : 1200
Dept : Administration *e*

REDUNDANT POST

In view of the recent developments which you are aware that the Managing Director has resigned from the Company service of which has caused you as a Secretary to be unable to fulfill your obligations to the Contract of Employment, the Company has no alternative but to terminate your services by giving you one (1) month notice with effect from 1st July 1999. *f*

We have decided to pay you one (1) month salary *in lieu* of notice and whatever annual leave so accrued.

You shall be paid the following:- *g*

a. Wages for the month of June 99	RM 2250.00	
b. Pay <i>in lieu</i> of notice	RM 2250.00	
c. Pay <i>in lieu</i> of earned & accrued annual leave	RM 1341.34	<i>h</i>
Sub total	RM 3591.34	

Less:-

a. E.P.F. RM 396.00 *i*

a b. Socso RM 9.75

Nett RM 3185.59

b The above sum (except the wages for the month of June 99 which will be paid into your bank account as normal) shall be withheld pending your income tax clearance for which a duly completed form IT 22A is herewith for your action.

Please call at the undersigned department for settling your accounts with us.

We also herewith thank you for your past services rendered and wish you success in your future endeavour.

c Yours sincerely,
INTERDATA TECHNOLOGIES (M) SDN. BHD.

signed
MAJ(R) OSMAN BIN HJ CHOT
Human Resources Manager

d acknowledgment of receipt of letter

Signature : ... Date: 30.6.99

Address: ...

e Contact Telephone No: 016

It is the claimant's contention that she was dismissed without just cause or excuse and prays for an order from the court that she be reinstated to her former post without any loss of wages, allowances, service, seniority, privileges or benefits of any kind whatsoever.

f In para. 5 of the statement-in-reply the company avers as follows:

5. Paragraph 7 of the Statement of Case is admitted save and except that the Claimant was terminated for just cause and reasons of

g I. An indirect consequent of Company's deplorable plunge in its business and profitability incapacitating it from retaining the Claimant.

II. A direct consequent of the redundancy of the Claimant's position as secretary following the resignation of the Company's expatriate managing director.

h III. And notwithstanding the foregoing reasons, the Company had tried to retain the Claimant by transferring her to the Sales & Marketing department as Sales Administrator and in which she had failed to perform. And therefore the Company had no other alternative but to discharge the Claimant.

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The Issues

It appears from the claimant's letter of termination (exh. "C4") that the company's case is that she had become redundant as a consequence of the resignation of the managing director, Brimble, and hence her services had to be terminated.

However in the statement-in-reply the company avers another reason for the claimant's dismissal which is not stated in exh. "C4" which is her alleged failure to perform on her transfer to the sales and marketing department as sales administrator after Brimble left.

Hence in view of the above reasons given by the company for the claimant's dismissal the issues before the court are:

- (i)(a) Did a redundancy situation arise in the company resulting in the claimant's retrenchment?
- (i)(b) If there was a redundancy situation was the consequential retrenchment made in compliance or in conformity with accepted standards of procedure? and
- (ii) Was the claimant guilty of poor performance?

The Law

In the ordinary acceptance "retrenchment" connotes that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplusage. See *Pipraich Sugar Mills v. Pipraich Sugar Mills Mazdur Union* AIR 1957 SC 95.

In Dunstan Ayadurai's "*Industrial Relations in Malaysia Law and Practice*" 2nd edition, at page 159; "redundancy" is defined as follows:

Redundancy refers to a surplus of labour and is normally the result of a reorganisation of the business of an employer, and its usual consequence retrenchment i.e. the termination by the employer of those employees found to be surplus to the requirements of the organization. Thus there must first be redundancy or surplus of labour before there can be retrenchment or termination of the surplus.

In *William Jacks & Co (M) Bhd v. S Balasingam* [1997] 3 CLJ 235, Gopal Sri Ram JCA at p. 241 states succinctly as follows:

... Retrenchment means: the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as punishment inflicted by way of disciplinary action (per SK Das J in *Hariprasad v. Divelkar* AIR [1957] SC 121 at p. 132).

- a* Whether the retrenchment exercise in a particular case is *bona fide* or otherwise, is a question of fact and of degree depending on the particular facts and circumstances of each case. It is well-settled that the employer is entitled to organize his business in the manner he considers best. So long as the managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact *bona fide*.
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It is a well established and an accepted practice of industrial law that in effecting retrenchment an employer should comply with the industrial law principle of “Last in, first out (LIFO)” unless there are sound and valid reasons for departure from its compliance.

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- As for dismissal or termination of the services of an employee on the ground of unsatisfactory work performance the test is whether a reasonable employer would have been justified in all the circumstances. See *Caleb Brett (M) Sdn. Bhd. Sarawak v. Abdul Rahman bin Ahmad Sharkawi @ Abdul Rahman bin Sarkawi* [1999] 2 ILR 1053. As far as unsatisfactory performance is concerned the Industrial Court has laid down that in order to justify the employee’s dismissal the employer has to establish the following:
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- e*
- (i) that the employee was warned about his poor performance;
 - (ii) that the employee was awarded sufficient opportunity to improve; and
 - (iii) that notwithstanding the above the employee failed to sufficiently improve his performance.
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In *IE Project Sdn Berhad v. Tan Lee Seng* [1987] 1 ILR 165 the learned Chairman stated:

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- Dismissal for unsatisfactory work or incompetency should almost invariably have been preceded by warnings. In the event of poor performance being the reason for the dismissal one should always endeavour to show that the work complained of was performed subsequent to warnings.

And he further articulated:

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- An employer should be very slow to dismiss on the ground that the employee is found to be unsatisfactory in his performance or incapable of performing the work which he is employed to do without first just telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving an opportunity of improving his performance. It is for the employer to find out from the employee why he is performing unsatisfactorily, to warn him that if he persists in doing
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- so he may have to go There is no record of such warnings.

It is a principle of industrial relations jurisprudence that in a dismissal case the employer must produce convincing and cogent evidence that the workman committed the offence or offences he is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer. It is for him to adduce evidence that the workman was dismissed for just cause or excuse. *a*

Evaluation and Conclusion

(i)(a) Did a redundancy situation arise in the company resulting in the claimant's retrenchment? *b*

It is pertinent to note that exh. "C4" the letter of dismissal contains the heading "Redundant Post" and then goes on to state that the claimant "as a Secretary to be unable to fulfill your obligations to the contract of employment". The contents of the letter is unclear and evidence should be adduced through its maker to explain the meaning. The court is in the dark as to what is meant by "the Claimant's inability to fulfill her obligations to the contract of employment". However the maker of this document Major (R) Osman Chot, the human resources manager, was never called as a witness to give his explanation as to the contents of the letter. It is imperative that evidence should be led through him but no reason has been given by the company for its failure to produce him. *c*

The company then relied on the audited accounts for the years 1998 and 1999 prepared by its auditors Aljeffri & Co. (exhs. "CO5" and "CO6") to show that financial hardship was suffered by the company. According to COW1, the Finance Manager of the company, because of the consecutive losses suffered for the two years it had to reduce and downsize its workforce. As a consequence it was unable to retain Brimble, and when he left the claimant had to be discharged. Both COW1 and COW2, the senior sales coordinator, also attested that when the claimant was retrenched there was no recruitment of anyone to replace her. *d*

It is the claimant's submission that there is a contradiction in the allegation contained in the letter of termination and the reason based on the pleadings. *e*

It is the claimant's argument that to prove that she was dismissed for just cause or excuse the maker of exh. "C4" should be called but since the company failed to call him an adverse inference must be drawn under s. 114(g) of the Evidence Act 1950 against it. Hence as a result of this fatal and glaring omission there is no evidence at all to establish that the claimant was dismissed for just cause or excuse. *f*

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a The claimant also submits that the company relied on exhs. "CO5" and "CO6" to show that the company suffered losses during the financial years of 1998 and 1999 but failed to call the makers of the documents ie, Aljeffri & Co to prove the contents. The claimant contends that this renders COW1's evidence inadmissible to that extent.

b It is the submission of the company with regards to the failure of calling Major (R) Osman Chot that s. 114(g) of the Evidence Act 1950 need not be followed by the court. The company contends that the court should hear and consider the evidence of COW1 and COW2 which is sufficient and adequate.

c The company also submits that COW1 is the material witness since he is in charge of the company's finances, payroll, income tax amongst other matters. It contends that it is not necessary to bring in the auditors since the audited accounts can be accepted at face value.

d Finally the company submits that there is no evidence of *mala fide* but that the basis of the reason for the claimant's dismissal was that Brimble left and the company could not afford to retain her.

e It is abundantly clear from the evidence that the company failed to prove that there was a redundancy situation arising leading to the claimant's retrenchment. Furthermore although COW1 testified by referring to the audited accounts of 1998 and 1999 that the company suffered losses of RM3,017,306 and RM6,443,244 respectively and that 39 employees were retrenched no documentary evidence was adduced to show who these staff were, who chose them and how they were chosen. The company also failed to prove that the

f claimant's job functions had become redundant when its only reason for dismissing her was that Brimble had resigned from the company. Furthermore no evidence was adduced to show that the company considered or carried out cost cutting measures in facing its financial problems. In view of the foregoing the court is of the view that the company failed to show that as a consequence of severe financial difficulties there was a necessity to restructure and to reorganize the company. It is the court's considered opinion that a redundancy situation did not exist in the company at the material time which led to the claimant's retrenchment.

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h (i)(b) If there was a redundancy situation was the consequential retrenchment made in compliance or in conformity with accepted standards of procedure?

i Assuming there was a redundancy situation the question is whether the company made a reasonable selection between or among comparable employees ie, in compliance with the principle of "Last in first out" (LIFO).

In *Nusantara Sakti Sdn Bhd v. Surindirjit Singh Atma Singh* [2000] 2 ILR 294 this division of the Court had stated: *a*

It is a well established and accepted practice of industrial law that in effecting retrenchment an employer should comply with the industrial law principle of “Last in first out” (LIFO) unless there are sound and valid reasons for departure from its compliance. *b*

Apart from the bare statement of COW1 that 39 employees were retrenched there is no evidence before the court as to who they were, what departments they were in, how the retrenchment exercise was carried out and that the LIFO principle had been adhered to. *c*

It is significant to note that in this instance the company also failed to ensure fair industrial practice by giving the claimant notice of the retrenchment so that she could be prepared for the unemployment situation and to give her ample time to find suitable alternative employment. *d*

In the circumstances the court concludes that the company failed to comply with the LIFO principle in retrenching the claimant. *d*

(ii) Was the claimant guilty of poor performance?

The evidence of COW1 and COW2 is that on Brimble’s leaving the company the claimant was directed to go to the sales department to assist COW2. According to COW2, the sales manager, one Ravi told her this. COW1’s testimony is that on being transferred there the claimant did not perform. COW2 on the other hand said that when she approached the claimant, she was told by the claimant that she cannot do the job since she was not used to the sales department. In cross-examination COW2 agreed that there was no letter of transfer to the claimant transferring her to the sales department. *e*
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The claimant testified that her position as secretary was never revoked by the company. She further denied being appointed by letter as a sales coordinator to assist in sales work after Brimble left. It is also her evidence that she was never given any written warning concerning her alleged poor performance as a sales co-ordinator in the sales department. *g*

It is the claimant’s submission that since she never reported to COW1 he cannot vouchsafe for her performance. She also contends that since the human resource officer was not called to give evidence concerning her transfer to the sales department an adverse inference should be drawn against the company under s. 114(g) of the Evidence Act 1950. The claimant also points out to the court that there is no evidence that any written warnings were given to her. *h*
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- a* The company submits that it is unnecessary that a letter of transfer be given to the claimant and that a verbal direction is sufficient. It is the company's further submission that when Brimble left it tried to retain the claimant in another job as a sales co-ordinator but the claimant did not perform so the company had no alternative but to dismiss her.
- b* Assuming that the claimant was indeed transferred to the sales department, it is crystal clear that she was never warned orally or in writing about her performance. The company further failed to show any written appraisal of the claimant to prove her alleged poor performance and any evidence that she was given guidance and opportunity to improve the alleged poor performance.
- c* In view of the foregoing the court concludes that the company failed to prove that the claimant was guilty of poor performance.

Finding

- d* After a careful deliberation of the totality of the evidence and for the foregoing reasons the court makes a finding:
- (i) that the company has failed to prove that there was a redundancy situation and as such the company has failed to establish on a balance of probabilities that the retrenchment exercise was *bona fide*; and
- e* (ii) that the company has failed to prove that the claimant was guilty of poor performance.

- In the final analysis the court further finds that the company's allegations against the claimant have not been proven and that her dismissal was without just cause or excuse. In view of the foregoing the court hereby decides in favour of the claimant.
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Remedy

- As for the remedy sought the court considers that in the interest of industrial harmony it is inappropriate to order the reinstatement of the claimant. The court will order compensation *in lieu* of reinstatement instead. Furthermore the claimant's evidence is that since March 2000 she has been gainfully employed as a secretary with Hanson Quarry Sdn Bhd at a salary of RM2,000 per month. Before that from 1 December 1999 to February 2000 she said she was employed as a clerk in a company where she received a monthly salary of RM1,000. In the circumstances it is fair and reasonable that an adjustment be made to an award of backwages. See *Koperasi Serbaguna Sanya Bhd, Sabah v. Dr. James Alfred (Sabah) & Anor* [2000] 3 CLJ 758.
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The court hereby makes the following order:

- i* The claimant shall be paid backwages from the date of dismissal (1.7.1999) to the last date of hearing (24.1.2003) ie,

RM2,250 x 42 3/4 months = RM96,187.50

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Less 40% = RM57,712.50

The claimant shall be paid *in lieu* of reinstatement one month's salary for every year of service (7.8.1995 to 24.1.2003) ie,

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RM 2,250 x 7 years = RM15,750

The court hereby orders that the total payment of RM73,462.50 (less income tax and EPF contribution, if any) be paid within thirty (30) days from the date of this award to the claimant's solicitors.

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