INDUSTRIAL COURT OF MALAYSIA

CASE NO.: 28(11)/4-551/16

BETWEEN

RAJ A/L JOSEPH APPADORAI

AND

LINDE MALAYSIA SDN.BHD.

AWARD NO: 873 OF 2019

Before	:	**Y.A. TUAN FRANKLIN GOONTING** **-CHAIRMAN**
Venue	:	Industrial Court of Malaysia, Kuala Lumpur
Date of Reference	:	14.04.2016
Dates of Mention	:	01.06.2016, 21.07.2016, 24.08.2016, 27.09.2016, 19.06.2017 07.01.2019, 14.01.2019, 11.02.2019, 13.02.2019
Dates of Hearing	:	19.07.2017, 20.07.2017, 04.12.2018
Representation	:	Mr.Munjit Singh From Malaysian Trades Union Congress (MTUC) Representative for the Claimant
	:	Mr. Vijayan Venugopal From Messrs Shearn Delamore & Co Counsel for the Company

Reference

[1] By this ministerial reference under Section 20(3) of the Industrial Relations Act 1967 the court was required to hear and determine the Claimant's complaint of his dismissal by the Company on 30.6.2015.

AWARD

[2] The Company's denies dismissing the Claimant and contends that the Claimant was medically boarded out pursuant to a mutual agreement. Further and in the alternative the Company contends that the Claimant's employment contract had been frustrated due to the Claimant's prolonged illness. Notwithstanding that dismissal was denied the Company's counsel agreed to start the case.

[3] The Claimant began his employment with the Company on 27.3.1980 as a General Hand. He was covered by the Collective Agreement between the Company and the Chemical Workers Union of Malaysia ("the Union"). His last held position in the Company was as a Production Overseer.

[4] It is an undisputed fact that as a result of, initially, a chronic lower back pain, and additionally, an injury to his left shoulder, the Claimant was away from work for a long period, i.e. 18.9.2014 and 12.8.2015, for which he furnished cumulative medical certificates, totalling 329 days, thereby exhausting his annual medical leave entitlement and medical entitlement. His annual medical leave entitlement was 28 days and for hospitalisation he was entitled to a maximum of 90 days. The Claimant's leave records (CO-1A to 1C) show that even prior to September 2014, he was habitually going on medical leave. For example, in the year 2012, he took 16 days medical leave. In the year 2013, he took 20 days medical leave. In the year 2014, just between the period 1.1.2014 and 17.9.2014, he had already taken 19 days medical leave and an additional

21 days hospitalisation leave. The court notes, especially, that from 18.9.2014 onwards, the Claimant never reported for work.

[5](i) Evidence was led through the Company's Employee Relations Officer, COW-2, as follows: - The Company was concerned about the Claimant's medical condition and prolonged absence from work. He (COW-2) had visited the Claimant at his home some time in January 2015. During this visit the Claimant had expressed his intention to resign and requested COW-2 to assist him to obtain a medical board out compensation. COW-2 followed up by taking this matter up with Mr.Murugan, who was the Chairman of the Union's On-Site Committee. On 5.5.2015 a meeting was held with the Claimant, the Union's On-Site Committee, and representatives of the Company including COW-2, to discuss this issue of medical board out.

(ii) Consequent upon this meeting the Company made an offer of an amount it would pay to the Claimant upon his being medically boarded out. The Claimant disagreed on the quantum and said he would revert to the Company.

(iii) Sometime in June 2015, COW-2 called the Claimant and informed him that he had already exceeded his medical entitlement for the year. Subsequently, in that same month a representative from the Union called COW-2 and proposed that the Company increase the offered amount and also absorb the Claimant's medical bills which had exceeded his medical entitlement.

(iv) The Company then proposed to pay to the Claimant the sum of RM32,000.00 arrived at as follows:

(a)	Medical Board Out Benefits	RM25,664.00
(b)	1month salary in lieu of notice	RM2,268.00
(c)	Payment for the remaining period the Claimant was on medical leave	RM2,268.00
(d)	Assistance for future treatment	RM1,800.00
		RM32,000.00

(v) Thereafter, the Union's On-Site Chairman, Mr Murugan called Wong Bing Wan, the Head of the Company's Human Resources Department, to confirm that they were agreeable to this proposed payment.

(vi) On 8.7.2015, COW-2 called the Claimant again and sought his confirmation of his acceptance of this offered package. The Claimant so confirmed to COW-2. So, COW-2 informed the Claimant that his last day of service with the Company would be 30.6.2015 and told him to collect the medical board out letter from the Company on 10.7.2015.

(vii) However, on 16.7.2016 the Claimant and Mr Murugan met with COW-2 and declined to accept the said medical board out letter. COW-2 explained to the Claimant that there was a valid agreement between the parties for the medical board out package and that the Claimant's last day of service was 30.6.2015.

(viii) In the light of the Claimant's refusal to accept the said medical board out letter despite the mutual medical board out agreement having earlier been reached, the Company couriered this letter dated 14.7.2015 to his home address. This letter was duly received by the Claimant as evidenced by the Poslaju Note and Payment receipt (CO-3). COW-2 had also advised the Claimant to obtain the necessary tax clearance from the Inland

Revenue Board to enable the Company to effect payment of the said agreed sum to him. To date this had not been forthcoming.

(ix) COW-2 also tendered his Maxis mobile phone bill (CO-4) which confirmed that he had called the Claimant's mobile phone number 0162932600 twice on 3.7.2015 (the conversations lasting 1 minute 46 seconds, and 7 minutes 33 seconds respectively) and once on 8.7.2015 (7 minutes). The court pauses here to state that COW-2 was not challenged in this regard while under cross examination by the Claimant's representative. It follows that the Claimant does not dispute that these telephone conversations between him and COW-2 had indeed taken place. In **Aik Ming (M) Sdn Bhd & 8 Ors v Chang Ching Chuen & 3 Ors & Another Case** (1995) 3 CLJ 639 the Court of Appeal stated:

> *"The law is clear on the subject. Wherever the opponent has declined to...himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice ----"*
> *(Emphasis added)*

[6] The Claimant's version is that he had not agreed to the offered package amount and that he had told Murugan that he was still waiting to get the doctor's opinion whether he could return to work. He further testified that he understood that to be legally binding there must be a signed agreement. To the court's mind, the Claimant was taking advantage of the absence of an executed agreement. Under cross-examination he agreed that he did not have any proof that he was fit to work. He further shot himself in the foot when he claimed that he had proposed to leave the Company on VSS to COW-2. This was clearly an afterthought as it had not been

pleaded. By this claim he let slip his real intention of pursuing the matter in court. It was not that he wanted his job back but that he wanted more money in the form of VSS compensation.

[7](i) The Claimant raised another argument, that is, that the Company had not complied with Article 23 of the Collective Agreement between the Union and the Company. This article reads as follows: -

ARTICLE 23: PROLONGED ILLNESS

23.1 In the case of an employee suffering from prolonged illness such as tuberculosis, cancer, poliomyelitis, leukaemia, leprosy, etc., he shall be entitled to sick leave to a maximum of 6 calendar months on full pay and 6 calendar months on half pay provided the employees so affected shall conform to the treatment prescribed by the Company's doctor or under any medical scheme to which the Company subscribes.

23.2 If at the end of the above long medical leave, the employee is still unfit for work and on recommendation from the Company Doctor he shall be medically discharged from the company service without any other procedures, otherwise a medically fit for duty certificate to be presented from the company's doctor to certify that the employee is fit for work.

23.3 Employees who fail to undergo necessary x-rays or carry out medical treatment as prescribed by medical officers of MAPTB or in its absence the government clinics or company appointed clinics, contact tuberculosis they shall forfeit benefits provided under Articles 22 to 23 above in so far as such benefits relate to tuberculosis.

(ii) Under cross-examination the Claimant admitted that his medical problem was a slipped disk, and injury to his shoulder which were unrelated to the diseases specified in Article 23 i.e. tuberculosis, cancer, leukaemia, etc. He agreed that Article 23 did not apply to him. The court views this introduction of a totally irrelevant matter by the Claimant as straw-clutching.

[8] The court observes that the Union, which had earlier involved itself in meetings and dialogue with the Company concerning the Claimant's exit from the Company on medical grounds, subsequently bowed out and left the Claimant to pursue his claim alone. This subsequent non-involvement and silence on the part of the Union says a lot. What comes across from this is that the Claimant, having initially agreed to accept the Company's board out compensation package, which had been hammered out through the good offices of the Union, subsequently changed his mind with afterthoughts, taking advantage of the fact that the said gentlemen's agreement had not been reduced to black and white. This is being opportunistic and goes against equity and good conscience.

Findings

[9] It was the Claimant himself who had raised the issue of being medically boarded out from the Company. This is consistent with the numerous days of medical leave taken him and the fact that from September 2014 onwards, he had never reported for work. Having reviewed the evidence before it, the court finds that the parties had mutually agreed that the Claimant be medically boarded out and that he had agreed to accept the negotiated package amount for such medical board out. The court also finds that the Claimant had reneged on that mutual agreement and had come to this court seeking, not reinstatement (which was physically impossible) but more money. A clear giveaway to his real intention was his introduction of an impleaded matter, that is, the VSS story (see paragraph 6 above). The court holds, therefore, that there was no dismissal.

Frustration

[10] Further, the Company pleads that the Claimant's employment contract had been frustrated by the Claimant's inability to perform, due to his prolonged illness. The fact is that he had failed to report for work since 18.9.2014 until his last day of employment i.e. 30.6.2015, with no indication when he could return to work. The Claimant himself agreed under cross-examination that he did not have any proof or anything indicating that he was fit to work.

[11] In **Harvey on Industrial Relations And Employment Law (Butterworths Series)** the learned author explains the doctrine of frustration in contracts of employment as follows: -

> *"Where the contract of employment is frustrated, it is terminated by operation of law and there is no dismissal under the statute. Consequently, the employee is unable to make a claim for unfair dismissal. If follows that in unfair dismissal cases it benefits the employer to assert that the contract has been frustrated, and for the employee to allege that it has not.*
>
> *The classic statement relating to the doctrine of frustration of contract is that of Lord Radcliffe in* ***Davies of Contractors Ltd v Fareham UDC*** *[1965] AC 696 at 725 where his Lordship said that frustration occurs when:*
>
> *"Without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance are called for would render it a thing radically different from that which was undertaken by the contract".*
>
> *A modern statement of the principle is found in Lord Brandon's speech in* ***Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal*** *[1983] 1 AC 854 at 909:*

"There are two essential facts which must be present in order to frustrate a contract. The first essential factor is that there must be some outside or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting which either makes it impossible for the contract to be performed at all, or at least renders its performance something radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside event or extraneous change of situation concerned, and the consequences of either in relation to the performance of the contract, must have occurred without the fault or the default of either party to the contract".

[12] In the case of **Pauline Peck V. Saratim Insurance Agency Services Sdn Bhd** [2010] 3 ILR 630 (Award No. 901 of 2010); [2013] 2 LNS 1815, the Industrial Court, in determining the issue of whether the contract of employment of a branch manager was frustrated for medical reasons, held:

"One of the ways by which a contract of employment may come to an end apart from the dismissal of an employee is by the application of the doctrine of frustration. By frustration, it means that there has been such a change of circumstances that events make it physically impossible for a contract to how performed as for example, where the illness of the employee lasts or is likely to last for a prolonged period. It cannot be disputed that illness or incapacity which is permanent will frustrate the contract, and so will illness which is of so prolonged a nature to prevent the employer from getting substantially what he has bargained for as it is also accepted that an employee must provide satisfactory performance of the work which he has contracted to do. ***(Kumpulan Guthrie Sdn Bhd v K.P. Sukumari Amana Narayanan Meon,*** *Award No. 33 of 1973)...The employers cannot be expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out his job to the full extent* ***(Garricks (Caterers) Ltd v. Nolan*** *[1980] 1 IRLR 259).*

[13] Guided by these authorities the court finds and holds that there was no dismissal by the Company and that the employment contract between the Claimant and the Company had been frustrated by the Claimant's prolonged illness and absence from work.

[14] The claim is dismissed.

[15] In its deliberations herein the court has acted according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

HANDED DOWN AND DATED THIS 6th DAY OF MARCH 2019

(FRANKLIN GOONTING)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR