

RAJENDRA RAO v. CIMB AVIVA ASSURANCE BERHAD (Court of Appeal Civil Appeal Case No. W-01 (A) – 245-07/2017)

29th January 2019

By Employment Law & Administrative Law Practice Group

We successfully defended CIMB Aviva Assurance Berhad ("the Company") in an action brought by its former Talent/Leadership/ Culture Lead & Business Partner ("the Claimant"). In its decision on 23 November 2018, the Court of Appeal ruled in favour of the Company and upheld the Claimant's non-confirmation in employment by concluding that substance takes precedence over form. This decision is crucial as it recognizes that in the course of assessing a probationer, the main consideration is whether the Company extended a fair assessment of the probationer notwithstanding that there was non-compliance to prescribed forms and procedures.

Facts:

The Claimant/ Appellant commenced employment with the Company/ Respondent as the Talent/Leadership/ Culture Lead & Business Partner, Grade 20 on 5 July 2010 and was subject to a 6 month probationary period in order for the Company to assess his suitability for confirmation. The Claimant's probationary period was subject to a further extension of 6 months. After approximately 12 months in employment, the Claimant was informed that he was not confirmed.

The Company's primary decision not to confirm the Claimant in employment was due to the following shortcomings:

- a. Absenteeism/ tardiness;
- b. Lack of accountability and ownership; and
- c. Lack of commitment;

The Claimant contended that his dismissal was unfair given the following, inter alia:

- a. The Company acted in breach of its Probation and Confirmation policy when the Company extended his probationary period on two occasions [as the policy only provided for an extension for one occasion];
- b. That the Claimant's immediate superior (COW1), failed to complete the prescribed Performance Improvement Plan form for emplacement on the PIP and for purposes of extending his probationary period of employment; and
- c. That there was purported victimization as COW1 was only employed 4 months into the Claimant's probationary period, which rendered his first 4 months of employment superfluous. This was compounded as COW1 conceded that she did not have sufficient time to assess the Claimant for confirmation which resulted in the first extension of his probationary period of employment.

The Industrial Court, vide Award 743 of 2016, ruled in favour of the Company. The Industrial Court held that the pertinent question was not whether there was a compliance of procedure but whether the Claimant was accorded a fair assessment by the Company in its decision not to confirm the Claimant in employment. Based on the evidence before the Industrial Court which took the form of voluminous exchanges of email correspondence as well as oral testimony, the Industrial Court concluded that the Claimant was granted sufficient opportunity to prove his suitability for confirmation which he failed to do. The non-confirmation was upheld.

Aggrieved with the Industrial Court's decision, the Claimant challenged the decision by way of a Judicial Review in the High Court. The High Court concurred with the findings of the Industrial Court and concluded that the most important question was whether the Claimant was given a fair assessment and not whether there was a strict adherence to format. In this regard, the High Court upheld the decision of the Industrial Court.

The Claimant challenged the High Court's decision in the Court of Appeal. The Claimant's main grounds of appeal were:-

- a. That there were specific formats in place in assessing the Claimant's suitability for confirmation, which the Company failed to comply with;
- b. That the Company failed to document the Claimant's performance deficiencies in the PIP templates which was a necessary procedure;
- c. That the Company had acted in contravention of its "Probation & Confirmation Policy" when the Company extended the Claimant's probationary period on two occasions despite the Policy stipulating that the Claimant's probationary period could only be extended once, and
- d. That the Claimant's contract clearly provided that any assessment on his probationary period must be solely based on his first six months of employment. As COW-1 admitted that she had insufficient time to assess the Claimant, the foregoing was therefore a breach of his expressed terms.

The Court of Appeal dismissed the Claimant's appeal and found that there were no merits to overturn the decisions of the High Court and Industrial Court.

In the upshot, the emphasis is placed on substance over form. In assessing a probationer, the paramount question to be determined is whether an employee was given a fair and reasonable assessment as opposed to a pedantic adherence to policies.

The matter was handled by Suganthi Singam, who is a Partner in our Employment & Administrative Law Practice.

For further information regarding employment and administrative law, please contact:

Sivabalah Nadarajah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

Raymond TC Low
raymond@shearndelamore.com

Suganthi Singam
suganthi@shearndelamore.com

7th Floor
Wisma Hamzah – Kwong Hing
No.1, Leboh Ampang
50100 Kuala Lumpur, Malaysia
Tel 603 2027 2727
Fax 603 2078 5625
E-mail info@shearndelamore.com
Website www.shearndelamore.com