LEE GUEK SIAN

v.

KENANGA WHOLESALE CITY SDN BHD

Industrial Court, Kuala Lumpur
Tay Lee Ly
Award No: 1280 of 2013 [Case No: 14/4-221/11]
15 July 2013

Civil Procedure: *Pleadings — Amendment — Company applied to amend its statement in reply to include misrepresentation as a ground for claimant's dismissal — Whether in accordance with equity and good conscience to allow company's application*

This was the company's application to amend its statement in reply ('SIR') to include misrepresentation as a ground for the claimant's dismissal. The claimant, a Finance Manager, averred that the company's decision to terminate her employment under the guise of retrenchment was unlawful and without just cause or excuse. The company averred that it had acted in good faith at all times and in accordance with proper industrial law and practices. In its SIR, the company sought to include allegation of misrepresentation by the claimant to the company in relation to her past working experience before joining the company. The claimant contended that the alleged misrepresentation was only discovered by the company after the claimant's dismissal and thus it could not be relied on later by the company as a just cause or excuse for dismissing the claimant.

Held (allowing the company's application in part):

(1) Based on the grounds of the application, objections of the claimant as well as submissions made by both parties, the company's application to amend its SIR was allowed except for the paragraphs regarding the claimant's alleged misrepresentation. It was undisputed by both parties that the discovery of the alleged misrepresentation on the part of the claimant by the company was after the dismissal of the claimant. Hence, it would not be in accordance with equity and good conscience to allow inclusion of paragraphs pertaining to the claimant's alleged misrepresentation in the company's proposed amended SIR. (paras 21, 22, 27)

Case Commentaries

- Interim awards are being handed down by the Industrial Court in increasing numbers to deal with technical issues which may arise in relation to disputes before the court. In the past, interim awards have dealt with a variety of issues including applications for joinder, requests to transfer a dispute from one division of the court to another, applications to reinstate a case which has previously been struck off by the court, and amendments to pleadings.

- Parties to a dispute being adjudicated at the Industrial Court are required to submit a statement of case and a statement in reply respectively. These documents are important as the court will only consider arguments raised in these statements and will disregard any points raised during the hearing itself but not included in the pleadings. Although the Industrial Court is a tribunal, which is not bound by the strict requirements of procedure and evidence found in the civil and criminal courts, nevertheless, it is required to abide by the principle that parties are bound by their pleadings. This is to ensure fairness to both parties and to ensure there are no "surprises" sprung by one party upon the other.

- The recruitment process, no matter how carefully conducted, does not guarantee that an employee will be successful in the position offered him or her. Given this reality, prudent employers, one, require new employees to undergo a probationary period and two, include in job application forms a declaration that must be signed by the applicant that all information given during the recruitment process is accurate to the best knowledge of the applicant and that any misrepresentation by the applicant may lead to termination of the employment contract.

- When employers are dissatisfied with the work performance of their employees it is common practice, especially if the employee is a senior manager, to "ask them to resign" rather than to terminate their contract. The intention of this practice may be to save the person the embarrassment and potentially negative impact on their future career of being "fired". It may also be assumed, albeit wrongly, that if an employee resigns, the employer will not have to defend a claim for reinstatement made under the Industrial Relations Act 1967. This assumption is incorrect as an employee may submit a resignation letter and later claim that he or she had been forced to resign.

- It is highly risky practice for an employer to give a reason for an employee's dismissal when, in fact, the real reason is quite different. For example, to issue a retrenchment letter to an employee when the actual reason for the termination was poor performance, is likely to cause a problem if the employee's claim for reinstatement reaches the Industrial Court.

- An employer may discover, after dismissing an employee, that various acts of misconduct have been committed by the employee which were not known at the time of the dismissal. These alleged acts of misconduct cannot be used in court to defend the act of dismissal as they were not cause for the dismissal.

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1996] 2 MLRA 80 (refd)

Abe Hatome (M) Sdn Bhd Negeri Sembilan v. Chan Kuan Hong [1996] 2 MELR 763 (refd)

Boston Deep Sea Fishing And Ice Company v. Ansell [1888] 39 Ch D 339 (distd)

Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd [2004] 1 MLRH 306 (refd)

Chong Geok Cheng v. Cargill Feed Sdn Bhd [2008] 2 MELR 514 (refd)

Gan Chee Ming v. Tn Forklift Holdings Sdn Bhd & Anor [2000] 3 MELR 88 (refd)

Goon Kwee Phoy v. J&P Coats (M) Bhd [1981] 1 MLRA 415 (refd)

Hercules Engineering (Sea) Sdn Bhd v. Cheah Khee How [2006] 2 MELR 795 (refd)

Hock Hua Bank Bhd v. Leong Yew Chin [1986] 1 MLRA 225 (refd)

Johor Port Bhd v. Zainul Mohd Nahu [2002] 2 MELR 410 (refd)

Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 1 MELR 10 (refd)

Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor [2002] 3 MLRH 292 (refd)

Mohd Tahir Abu Hassan v. Shin-Etsu Polymer (Malaysia) Sdn Bhd [2012] MELRU 973 (refd)

Muhammad Haikal Abdullah v. Obs Restaurants Malaysia Sdn Bhd [2009] 3 MELR 292 (refd)

Schmidt Scientific Sdn Bhd v. Ooi Ewe Min [2002] 2 MELR 485 (refd)

Styrotek Industries Sdn Bhd v. Thiang Yam Mee [2001] 2 MELR 38 (refd)

Tay Chuan Chan v. United Malacca Berhad [2012] MELRU 972 (refd)

W Devis & Sons Ltd v. Atkins [1977] 3 All ER 40 (refd)

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1982] 1 MLRA 417 (refd)

Legislation referred to:

Industrial Court Rules 1967, r 10(3)

Industrial Relations Act 1967, ss 20(3), 30(5)

Other(s) referred to:

Halsbury's Laws of Malaysia, Civil Procedure vol 1, 2002 reissue, p 258

Dr Dunston Ayadurai, *Industrial Relations in Malaysia, Law and Practice*, 3rd edn, pp 333-335

Counsel:

For the claimant: VK Raj; M/s P Kuppusamy & Co

For the company: Justin Voon (Alvin Lai with him); M/s Justin Voon Chooi & Wing

AWARD

Tay Lee Ly:

Introduction

[1] This dispute in this case arose from the alleged dismissal of Lee Guek Sian ("claimant") by Kenanga Wholesale City Sdn Bhd ("company") on 17 September 2009. The dispute was referred to Industrial Court ("IC") by order of Honourable Minister under s 20(3) Industrial Relations Act 1967 (Act 177) ("IRA") on 25 October 2010.

Background

[2] Some relevant background of this case are as follows:

(a) 21 July 2011 - claimant filed her statement of case ("SOC") together with documents. The claimant was represented by Mr K Gunaseelan from Malaysian Trade Union Congress ("MTUC");

(b) 19 September 2011 - company filed its statement in reply dated ("SIR"). The company subsequently filed its bundle of document ("BOD") on 27 June 2012. The company was represented by Trevor George Partnership;

(c) case was scheduled for hearing on 28 June 2012, 13 August 2012 and 14 August 2012. Hearing of case did not proceed on 28 June 2012 because company's learned counsel was unwell. Hearing on 13 August 2012 and 14 August 2012 was adjourned because the claimant wished to appoint a new counsel as her representative from MTUC has discharged himself;

(d) 4 January 2013 - when the case was called for mention, the claimant was represented by Mr VK Raj from Messrs P Kuppusamy & Co. The company's representative informed court that the company was in the midst of appointing a new counsel. Hearing was rescheduled to 8 July 2013 to 10 July 2013;

(e) 29 March 2013 - case was called for mention. The company was represented by Mr Alvin Lai from Messrs Justin Voon Chooi & Wing. Mr Alvin informed that the company would apply for an amendment of the SIR;

(f) 16 April 2013 - company filed a Notice of Application (encl 64A) ("application") together with proposed Amended SIR ("ASIR") dated 15 April 2013. The application was supported by an affidavit affirmed by Mr Bong Yam Keng affirmed on 15 April 2013 ("company's affidavit");

(g) 9 May 2013 - claimant objected to the application and filed her affidavit in reply affirmed on 2 June 2013 ("claimant's affidavit");

(h) 5 June 2013 - hearing of the application. Subsequently counsel for both filed additional written submissions;

(i) 25 June 2013 - with the consent of both parties, I gave an oral ruling on the application, wherein I allowed the company's application to amend its SIR as stated in the proposed ASIR except for paras 3.13, 3.13.1, 3.13.2, 3.13.3, 3.13.4, 3.14 and 3.15 of the proposed ASIR. The company was directed to file the ASIR by 1 July 2013 and the claimant allowed to file rejoinder by 5 July 2013;

(j) 1 July 2013 - company's application for written award of the application for purpose of judicial review on paras 3.13, 3.13.1, 3.13.2, 3.13.3, 3.13.4, 3.14 and 3.15 of the proposed ASIR (which were not allowed by this court) and adjournment of hearing on 8 to 10 July 2013 on grounds stated in its letter; and

(k) 9 July 2013 - case was called for mention. After considering the company's application for adjournment and claimant's objection, I allowed an adjournment of hearing of this case pending handing down of this award. The hearing of this case was rescheduled to dates agreed by both parties, ie on 30 to 31 October 2013 and 7 to 9 November 2013. Parties were also informed that the hearing of this case would commence if no order of stay of proceedings is obtained from the High Court.

Proposed ASIR

[3] The proposed amendments are underlined in red in the proposed ASIR. In this award, the proposed amendments are underlined in black and have been summarised as follows (apart from minor amendments):

(a) in para 1 SIR, by substituting the word "dismissal" with the word "retrenchment" and deleting the words "and para 2 of the statement of case is denied.";

(b) in para 3:

(i) by inserting the words "In reply to paras 2, 3, 4, 7 and 8 of the statement of case" at the beginning of the paragraph; and

(ii) by substituting the word "dismissal" with the word "retrenchment";

(c) in para 3.1 SIR, by inserting after the words "(CL2, CLB)", a new sentence as follows:

"The claimant commenced her employment with the company on about 28 January 2008 (not "28th January 2007" as erroneously stated by the claimant in para 3 of the statement of case)."

(d) inserting new subparas 3.2(a) to (d) as follows:

"3.2 The said memo dated 18 February 2008 (as stated in para 8 of the statement of case) was issued by the company based on the representations made by the claimant to the company prior to the commencement of her employment with the company, which *inter alia* persuaded the company to her. Apart from the said representation made by the claimant before she was employed by the company, the claimant also made the representations, *inter alia*, as follows:

(a) The claimant had submitted the "Application For Employment" together with the attached letter of Application For the Post of Accountant" and Resume (hereinafter collectively referred to as "the Application For Employment");

[A copy of the Application For Employment is annexed herewith and marked as exh "CO2" at pp 3-8 of the CBOD.]

(b) Even though the form for the Application For Employment is under the name of "Dataran Asli Development Sdn Bhd" (a company related to the company). It was actually intended as the application by the claimant for the post of "Finance Manager" in the company and its related companies. The claimant is well aware of this at all the material times. During the interview, when this piece of Application For Employment form was given to and signed by the claimant, she was being interviewed to join the company and to take care of its group account. Upon "the Application For Employment", she was employed by the company.

(c) The claimant had expressly declared in writing that all the particulars including all her past employment history given in the Application For Employment are true and correct. The claimant also agreed that the employment contract can be terminated by the company if it is discovered that the said particulars given by the claimant were false, untrue or incorrect;

(d) The claimant also represented that she has purportedly good qualification and wide experience in finance, accounting, administration and management to achieve the company's goal and to meet the job requirements of the company

including to review the accounting systems and procedures of the company's Group and to implement/set up an accounting system of the company and the Group's accounts.";

(e) in para 3.2 SIR:

(i) by renumbering para 3.2 as para 3.3;

(ii) by renumbering paras 3.2.1 to 3.2.6 consecutively as paras (a) to (f);

(iii) by renumbering para 3.2.7 as para (j);

(iv) by renumbering para 3.2.8 as para (l); and

(v) by inserting new paras (g), (h), (i) and (k) as follows;

(g) to review financial accounts, debtors and creditors listing and redemption sum;

(h) to coordinate to ensure annual audit of the company are completed timely;

(i) to liaise with bankers, auditor, tax consultant and company secretary;

(k) to monitor and take care of the overall accounts of the company and its group of companies;"

(f) by inserting new para 3.4 as follows:

"3.4 Further, the employment contract expressly provides that the employment contract can be terminated by giving one month notice and if such termination is due to the claimant's misconduct or non-performance of duties, she can be terminated without notice or payment *in lieu* of notice. Paragraph 3 of the employment dated 21 December 2007 provides that:

"After confirmation, the notice period for resignation or termination will be one month's in writing or one month's salary *in lieu* of notice. However, if such termination is due to your misconduct or non-performance of duties, you shall be subject to summary dismissal without notice or payment *in lieu* of notice."

(g) by renumbering paras 3.3, 3.4 and 3.5 as paras 3.5, 3.6 and 3.7 accordingly;

(h) by renumbering paras 3.5.1, 3.5.2, 3.5.3, 3.5.4, 3.5.6 as paras 3.7.1, 3.7.2, 3.7.3, 3.7.4, 3.7.5 and 3.7.6;

(i) by inserting after para 3.7.6, new paras 3.7.7, 3.7.8 and 3.7.9 as follows:

"3.7.7 Failure to take into account the construction loan and interest payable on the loan when the claimant prepared the cash flow forecast for the company and/or its related companies;

3.7.8 Failure to prepare and provide the management accounts and cash flow projection review to the company and/or its related companies within the stipulated time for the purpose of the weekly meetings for financial review;

3.7.9 Failure to issue payment vouchers and record payments under the correct company's account. For example, the claimant issued payment vouchers under the account of Dataran Asli Development Sdn Bhd when the payments for some consultant fees and purchases were actually the cost under the account of the company (Kenanga City Sdn Bhd).";

(j) by inserting a new para 3.8 as follows:

"3.8 The company had reviewed the work performance of the claimant accordingly and found that the claimant's performance was very poor and unsatisfactory as she *inter alia* made many mistake in her works, did not even appreciate the basic accounting knowledge and failed to perform her duties in the course of her employment. This led the company to question her abilities and whether she had the requisite qualification and/or experience necessary for the job. Prior to the dismissal of the claimant, the company and its representatives had verbally informed/communicated to the claimant pertaining to her poor performance at work, so that the claimant can improve her work performance. However, the claimant had failed to improve her work and to discharge her duties assigned to her as a Finance Manager.";

(k) by renumbering para 3.6 as para 3.9 and by:

(i) substituting the words "of being rendered redundant" with the words that she could not substantially "contribute" in her role as "Finance Manager"; and

(ii) inserting after the words "the company's accounts", the words "mainly due to her poor performance at work and failure to discharge her duties as a Finance Manager".

(l) by inserting new paras 3.10 and 3.11 as follows:

"3.10 Prior to the dismissal of the claimant, the company vide Mr Bernard Bong had called for a meeting with the claimant. The company had informed the claimant that the company had reviewed her work performance and discovered that her work performance was unsatisfactory, she has failed to discharge her duties as a Finance Manager and she caused many problems to the company's accounts which required to be rectified/amended by the company's other employees;

3.11 Instead of giving a notice of termination of the employment contract with the claimant due to her failure to perform her duties, the company informed the claimant that it would be better for her future career and future reference on record if the claimant could voluntarily resign as opposed to a termination of the employment by the company";

(m) by renumbering para 3.7 as para 3.12 and amendment as follows:

"3.12 Subsequently, as the claimant did not resign, the company's management had decided to terminate the service of the claimant mainly due to her poor performance at work and failure to discharge her duties as a Finance Manager. Nevertheless, as the company did not intend to give a bleak future to the claimant and for her better future career and better reference in future when she applies for another job, the company had decided to issue a letter with title "Notice of Retrenchment" to the claimant as opposed to a notice of termination of her service. On 18 August 2009, the company issued a notice of retrenchment (CL1-CLB) to the claimant with a retrenchment benefit of one month's salary and for the claimant's accrued annual leave accrued to be compensated; and

(n) by inserting new paras 3.13, 3.13.1, 3.13.2, 3.13.3, 3.13.4, 3.14, 3.15 and 3.17 as follows:

"3.13 Further, it was also discovered by the company that the claimant had fraudulently misrepresented the company as to her employment history when she submitted her Application For Employment.

3.13.1 In fact the claimant intentionally and deliberately did not disclose her full employment history as she was actually previously hired as "Finance and Admin. Manager" in August 2002 by a company known as Rigel Technology Sdn Bhd and was subsequently dismissed by the said

former employer. There was no full disclosure of the said previous, employment and the dismissal by her former employer even though the claimant and declared in writing that all the particulars in the Application For Employment represented to the company are true and correct in respect of her past employments.

3.13.2 However, in order to induce the company to employ her, the claimant had instead misrepresented that she was previously employed as "Finance and Administration Manager in a company known as "Sintech Electric Sdn Bhd" from June 1998 to January 2003.

3.13.3 The company had been misrepresented by the claimant as to her previous employment history. If not for the misrepresentation and the non-disclosure of the dismissal by her former employer, the company would not have employed the claimant as the Finance Manager in the first place. This also shows that the claimant does not have a good employment history and was in fact dismissed by the former employer as well.

3.13.4 Pursuant to the Application For Employment signed by the claimant, the company is also entitled to terminate the claimant's service since it was discovered that there was a misrepresentation by the claimant as to the particular of her past employment.

3.14 The company stated that the claimant is not a credible person and did not honestly disclose her abilities and/ or past experience to the company."

3.15 At all material times, the claimant knew she was being dishonest based on the aforesaid reasons.

3.17 The company states that the dismissal of the claimant was done with just cause and excuse in the present case."

Parties' Pleaded Case

[4] The claimant commenced employment with the company as a Finance Manager on 28 January 2007 with a basic salary of RM7,000 per month. She was confirmed on 20 May 2008. She averred in her SOC that the company's decision to terminate her employment under the guise of retrenchment was unlawful and without just cause or excuse. She also pleaded *inter alia* that:

(a) her dismissal vide letter dated 18 August 2009 was under the guise of 'retrenchment' but she was given one month notice. Hence, she was paid her salary up to 17 September 2009;

(b) upon the resignation of the Legal Manager (one Mr Ding) on 6 April 2008, she was given additional functions of the legal manager;

(c) she had to continue with her duties as a Finance Manager and the additional functions of Legal Manager even after the notice of her retrenchment. On 17 September 2009 the claimant had informed concerned parties that the CM & Investment meetings had been rescheduled to 23 September 2009 and she was busy discharging her duties until the last days of her employment;

(d) at the height of her career, on 15 June 200 the company hired another Finance Manager (one Ms Siah) and she was instructed to hand over the finance and accounting matters of the company to Ms Siah. Thereafter, she was gradually sidelined by the company but continued with the job function of a Finance Manager overlooking the finance and accounting matters of the director of its related companies;

(e) the company had sometime in April 2009 hired a part-time consultant (one Mr Pook) to be in charge of the group financing of the company. Mr Bong had informed the claimant that Mr Pook could not get along with the claimant and did not require the claimant to assist on finance and accounting matters;

(f) her job functions in the company were manifolds ranging from verifying progress payments of contractors and consultants to reviewing monthly financial accounts, debtors listing and redemption;

(g) she had been up to the mark in respect of her performance in the company and had never been hauled up for any disciplinary action and had an excellent track record in the company; and

(h) the termination of her employment was done in bad faith and was tainted with *mala fide*.

[5] The company in its SIR averred that the company had acted in good faith at all times and in accordance with proper industrial law and practices. It was also the company's contention that the claimant was retrenched with just cause or excuse as her job functions had become redundant, primarily due to her inability to satisfactorily perform her job which resulted in others being brought in to clean up her mess and to take over her job functions. The company averred in para 3.2 SIR, that the claimant's designation of duties, among others were:

(a) to set up and implement the accounting system of the company, Central Market and KS Power (Group accounts);

(b) to report monthly sales of the company to AmBank;

(c) to prepare monthly cash flow projection for the company;

(d) to update on estimated tax payable for the company which was in the six and nine month of the company's fiscal year;

(e) to review various transactions in the Ambank loan repayment statements;

(f) to follow up with the company Secretary on required resolutions for Central Market Ventures; and

(g) to take minutes at weekly committee meetings.

[6] It was also the company's averment that due to the claimant's lack of diligence at work, the accounting system for the Group accounts were not successfully implemented and the job functions stated had to be taken over by Ms Siah, Mr Pook and Mr CL Wong respectively. On or about September 2008, the claimant requested to be transferred to the company's Corporate Office to solely concentrate on the company's accounts as she was unable to handle the Group accounts. The company allowed her request (thereby reducing her job functions) but she still failed to diligently and/or responsibly complete her assigned tasks and duties. The company also pleaded some examples of the claimant's unsatisfactory performance in its SIR.

[7] Following from the above, the company had no choice but to bring in Ms Wendy Kam as an Assistant General Manager to guide the claimant and sometime around March 2009, Ms Wendy Kam had resigned and the company then had to further hire a Senior General Manager, Mr Pook, to replace Ms Wendy Kam and to supervise the Finance Department and a Finance Manager, Ms Siah, to manage/adjust and amend the accounts of the company. As a consequence, the claimant's duties were significantly reduced to the point of being rendered redundant and the claimant was no longer put in charge of the company's accounts.

[8] On 18 August 2009, the company issued a notice of retrenchment to the claimant with a retrenchment benefit of one month's salary and for the claimant's accrued annual leave accrued to be compensated. However, instead of leaving immediately after 17 September 2011, the claimant requested (in a meeting) to remain in the company for an extra month for her to look for another job. Out of courtesy to her, the company's Managing Director agreed to her request.

Grounds Of Application And Objections

[9] The grounds of application as gleaned from company's affidavit are *inter alia* as follows:

(a) to reflect the actual facts of the case and to give a clearer picture of the facts for the purpose of determining the real question in controversy between the parties;

(b) the claimant was dismissed mainly due to her poor performance. The company was trying to "assist" the claimant and had therefore issued a notice of purported "retrenchment" so that it would not cast a "slur" on her future job prospect as compared to a "termination";

(c) the questions which were in controversy between the parties should be determined by the court at trial as a whole in order to lead to a fair and just decision; and

(d) the amendments would not prejudice the claimant and was substantially based on the same background facts. The claimant would be given opportunity to give evidence to rebut the company's case and present her own case at the trial later.

[10] The claimant's objections as gleaned from the claimant's affidavit are as follows:

(a) the proposed ASIR would change the suit from one character into a suit of another and inconsistent character;

(b) the proposed ASIR are not *bona fide* and would cause injustice to her as the proposed amendments sought to change the scope of her representations;

(c) the application was filed after the company lost its civil claim against the claimant in the Sessions Court on 29 November 2012 (see draft judgment dated 29 November 2012 marked "exh L1"). The decision is pending appeal to the High Court; and

(d) the proposed ASIR is prejudicial to the claimant because the company has changed its plea drastically from "retrenchment" to "poor-performance" and did not base on the same background facts.

Parties' Submissions

[11] The company's learned counsel submitted *inter alia* that:

(a) the proposed ASIR was *bona fide* and made based on actual facts. The proposed ASIR would not prejudice the claimant as the company was still required to prove the pleaded case;

(b) the claimant herself had used the words "under the guise of retrenchment" in her SOC. The word "guise" showed that the true nature of the termination was something else other than "retrenchment". Hence, the proposed amendments to paras 1 and 3 SIR;

(c) the proposed amendments as in paras 3.5, 3.7, 3.8, 3.9 and 3.10 of proposed ASIR were consistent with the company's original pleadings and were merely an extension of the same issue based on the same background facts in order to clarify the actual circumstances prior to the dismissal;

(d) the proposed amendments as in paras 3.11 and 3.12 of proposed ASIR were to clarify the actual intention of the company when the "Notice of Retrenchment" was issued and the termination was mainly due to her poor performance at work;

(e) the proposed amendments as paras 3.13, 3.14 and 3.15 of proposed ASIR were to add the averment that the claimant was not an honest person and there was misrepresentation on her employment history. There was no disclosure of her previous employment as a "Finance and Administrative Manager" in 2002 in Rigel Technology Sdn Bhd which also dismissed the claimant's employment. Instead, she misrepresented to the company that she was previously employed in Sintech Electric Sdn Bhd in 2002;

(f) the company was entitled to amend its pleadings at any stage in order to put forward a complete defence and all the relevant facts and issues. The company should not be punished for any mistake made in the original pleadings which was drafted by its previous solicitors. (see *Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd* [2004] 1 MLRH 306 [Item no 5 in CBOA]);

(g) the proposed amendment on the issue of poor performance was merely an extension of the original pleadings based on substantially the same background facts to justify the dismissal. As such, it was not a completely new line of defence. (see Federal Court case of *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1982] 1 MLRA 417 ("*Yamaha Motor*") [Item no 1 in CBOA]);

(h) the proposed amendments would not affect the jurisdiction of IC. There was no change of the scope of the Minister's reference as this case was still well within the subject matter of the reference under s 20 IRA. The question to be decided by IC was still the same, ie whether the "dismissal" or "termination" was done with just cause and excuse. (see: *Muhammad Haikal Abdullah v. Obs Restaurants Malaysia Sdn Bhd* [2009] 3 MELR 292) [Item no 6 in CBOA];

(i) the issue of "poor performance" had already been pleaded by the company in the original paras 3.3, 3.4, 3.5, 3.6, 10 and 11 of SIR which *inter alia* stated that "primarily due to her inability to satisfactorily perform her job, and which resulted in others having been brought in to clean up her mess and to take over her job functions". Hence, it is not true and misconceived that the proposed amendments in respect of the poor performance "is quite a drastic change and obviously not based on the same background facts" (as alleged by the claimant in her affidavit); (see *Yamaha Motor (supra)* and *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1996] 2 MLRA 80 [Item no 7 in CBOA]; and

(j) the company would lead evidence to prove the pleaded case in the ASIR at the trial. It is trite law that the merit of the proposed amendment is irrelevant at the application stage. The issue on whether the company's pleaded case has any merit ought to be decided at the trial after hearing all the evidence and arguments. (see: *Yamaha Motor (supra)* and *Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor* [2002] 3 MLRH 292 [Item no 9 in CBOA]).

[12] The claimant's learned counsel on the other hand submitted *inter alia* as follows:

(a) misrepresentation was never a reason for dismissal. In any event, it was only discovered after the claimant's dismissal could not be relied on later by the company as "just cause or excuse" for dismissing the claimant (see: *Gan Chee Ming v. Tn Forklift Holdings Sdn Bhd & Anor* [2000] 3 MELR 88 ("*Gan Chee Ming*");

(b) the claimant had never misrepresented herself to the company. The company had the opportunity to check and verify her application form;

(c) fraudulent misrepresentation was not in the Minister's reference and hence amendment should not be allowed to include fraudulent misrepresentation;

(d) the proposed amendments as in paras 3.5, 3.7, 3.8, 3.9 and 3.10 of proposed ASIR were not necessary if the company alleged that they were based on same background and were merely an extension of the issue of poor performance which had been pleaded in its original SIR. The company could lead such evidence during the trial;

(e) the proposed amendments as in paras 3.5, 3.7, 3.8, 3.9, 3.10, 3.11 and 3.12 ASIR were not in the scope of Minister's reference. The reason given by the company was as stated in the letter of

dismissal (see exh CL1 entitled "Notice of Retrenchment"). The claimant's complaint to Industrial Relations Department ("IRD") was based on the reason given by the company in its letter;

(f) IC's jurisdiction is derived from the Minister's reference and the company ought to have joined the Minister as a party to this case or should have taken this matter to the High Court if the company is challenging the Minister's reference. (See *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 1 MELR 10);

(g) the proposed ASIR did not satisfy the requirements stated in FC case of *Yamaha Motors (supra)*;

(h) the question on whether the application was made *bona fide* was in issue when the application was only made after the decision of Sessions Court (wherein the company lost its suit against the claimant to recover salary of six other employees which the company alleged that the company had to hire to do the claimant's work);

(i) as regards the argument that the deponent was not aware and gave wrong facts to the previous solicitor and therefore had to make amendments to SIR, it was submitted that the company's affidavit did not state as such. Instead the company's affidavit merely stated "upon advice" (see para 8 of company's affidavit). If the application were *bona fide*, the company ought to have put in an affidavit affirmed by the previous solicitor; and

(j) the prejudicial effect on the claimant could not be compensated in costs.

[13] In respect of proposed paras 3.13 (3.13.1-3.13.4) of the proposed ASIR (which sought to include allegations of dishonesty and misrepresentation by the claimant to the company in relation to her past working experience before joining the company which was only discovered by the company after the claimant's dismissal), it was the submission of the company that the law permits the company to rely on any misconduct of the claimant prior to the dismissal even if discovered after the dismissal.

[14] The company's learned counsel in his additional short submissions vide letters dated 11 June 2013 and 13 June 2013 further submitted *inter alia* that the case of *Gan Chee Ming (supra)* could be distinguished from the present case as *Gan Chee Ming (supra)* refers to events which occurred after the dismissal of the claimant [see p 18b *Gan Chee Ming (supra)*]. In this case, the event of misrepresentation by the claimant occurred prior to her dismissal but was only discovered by the company after the dismissal of the claimant. In support of this submission, the company's learned counsel referred to *Boston Deep Sea*

Fishing And Ice Company v. Ansell [1888] 39 Ch D 339 at pp 344 & 347 (Item no 1 in ABOA], where the court decided that dismissal may be justified by reliance on facts not known to the employer at the time of dismissal but only discovered subsequently, even after proceedings had begun. It was also the submission of the company's learned counsel that this principle was:

(a) acknowledged by Ian HC Chin J in *Tanavanus Sdn Bhd v. Simon Jingking Pingguan @ Simon Jenkins* [1996] 7 MLRH 333 [Item no 2 in ABOA]);

(b) accepted and adopted in *Cowie v. Berger International Pte Ltd* [1999] 3 SLR 491 at 492 [Item no 3 in ABOA] and *Goh Kim Hai Edward v. Pacific Van Investment Holdings Ltd* [1996] 2 SLR 109, at 116 H-I [Item no 4 in ABOA];

(c) in *Cyril Leonard & Co v. Simo Securities Trust Ltd And Others* [1971] 3 All ER 1313 at p 1313, Plowman J held that "defendants would have a good defence to an action for wrongful dismissal even though they were not aware of the plaintiffs' conduct at the time when they determined the contract"; and

(d) In *Yeap Peng Huat v. Burswood Resort (Management) Ltd & Anor* [2010] 14 MLRH 86 [Item no 8 in ABOA], Aziah Ali J (as Her Ladyship then was) dismissed the claimant's judicial review application of IC's award that granted 30% reduction of the compensation and back-wages by taking into consideration the claimant's post dismissal misconduct.

[15] The claimant's reply to the company's Short Additional Submission was *inter alia* as follows:

(a) the company presumed that it was a fact that there was dishonesty on the part of the claimant. This fact was unproven before the proceedings in the Sessions Court (see the Notes of Evidence in the Sessions Court proceedings, where the claimant had stated that she did not include her employment history in Rigel Technology because it was only for a short period of three months) as the Sessions Court did not make any finding of misrepresentation even though "misrepresentation" was part of company's pleaded case. Hence, it appeared that the company would want two bites of the cherry;

(b) the case of *Gan Chee Ming (supra)* is directly applicable as the 'discovery' of the alleged misrepresentation on the part of the company was after the dismissal of the claimant's employment. The company could not rely on a discovery after dismissal (after having dismissed the claimant for retrenchment) to justify its dismissal on such latent discovery;

(c) the authority of *Boston Deep Sea Fishing (supra)* could be easily distinguished and therefore could not be relied on;

(d) the company's discovery was based on its assumption or suspicion that the claimant had misrepresented about her employment history. This evidence was apparently not legally sufficient before the Sessions Court. The claimant's statement of her employment history was not made under oath. Hence, it is insufficient material for the company to apply to amend its SIR to include 'misrepresentation' as a grounds for dismissal. (see the case of *Goon Kwee Phoy v. J&P Coats (M) Bhd* [1981] 1 MLRA 415 ("*Goon Kwee Phoy*"), where FC expounded the principle that IC's duty is to find out the reason for the dismissal and whether the employer can justify that reason;

(e) the cases cited by the company are not wholly applicable and could easily be distinguished from the present case; and

(f) the company is trying to re-litigate the issue concerning the alleged misrepresentation on the part of the claimant before IC when this issue had been tried in the Sessions Court but the Sessions Court did not rule in favour of the company. Hence, it is clearly an afterthought.

Decision

[16] In considering an application for amendment of pleadings, the important factor which the court is mindful, is the object and functions of pleadings. The functions of pleadings as stated in *Halsbury's Laws of Malaysia*, Civil Procedure vol 1, 2002 reissue, p 258 are as follows:

> "[10.3.130] Function of pleadings: **The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Thus a party is bound by his pleadings and his case is confined to the issue raised on the pleadings unless and until they are amended**. A plaintiff who at the trial radically departs from his case as pleaded, however, is likely to fail. It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings the appropriate method of trial can be determined. They also form a record which will be available if the issues are sought to be litigated again. The matters in issue are determined by the state of pleadings at their close."
>
> [Emphasis Added].

[See also *Abe Hatome (M) Sdn Bhd Negeri Sembilan v. Chan Kuan Hong* [1996] 2 MELR 763 and *Johor Port Bhd v. Zainul Mohd Nahu* [2002] 2 MELR 410.]

[17] As rightly cited by both learned counsel, in the FC case of *Yamaha Motor (supra)*, Mohamed Azmi FJ at p 418 laid down the principles governing amendments to pleadings as follows:

> "The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result (1) whether the application is *bona fide* (2) whether the prejudice cause to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character (see Mallal's Supreme Court Practice p 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement in claim."

[18] The case of *Yamaha Motor* has been cited in many IC cases, eg see *Chong Geok Cheng v. Cargill Feed Sdn Bhd* [2008] 2 MELR 514 ("*Chong Geok Cheng*"); *Schmidt Scientific Sdn Bhd v. Ooi Ewe Min* [2002] 2 MELR 485; *Hercules Engineering (Sea) Sdn Bhd v. Cheah Khee How* [2006] 2 MELR 795; *Mohd Tahir Abu Hassan v. Shin-Etsu Polymer (Malaysia) Sdn Bhd* [2012] MELRU 973 and *Tay Chuan Chan v. United Malacca Berhad* [2012] MELRU 972.

[19] In the Supreme Court case of *Hock Hua Bank Bhd v. Leong Yew Chin* [1986] 1 MLRA 225, Syed Agil Barakbah SCJ further stated the following:

> "Generally speaking, the overriding principle with regard to amendments is that they will be allowed at any stage of the proceedings on such terms as to costs or otherwise as the court thinks just. (See r 5(1)). However, the court will refuse leave to allow such amendments if it results in prejudice or injury to the other party which cannot be properly compensated for by costs. **The object of allowing amendments at any stage of the proceedings is to enable the party to present his case properly at the trial.** Amendments ought to be made to enable the court to determine the real question in controversy between the parties or of correcting any defect or error in any proceedings. In considering any amendment, the court will have regard to any undue delay or whether the application is made *mala fide* or whether such amendment will in any way unfairly prejudice the other party."
>
> [Emphasis Added].

[20] As regards SIR under IRA, r 10(3) of the Industrial Court Rules 1967 [PU (A) 406-1967] provides as follows:

> "(3) Such statement in reply shall be **confined to the matters raised in the statement of case and to any issues which are included in the case referred to the court by the Minister or in the matter required to be determined by the court under the provisions of the Act and which may have been omitted from the statement of case and shall contain:**

(i) a statement of all relevant facts and arguments;".

[Emphasis Added].

[21] In the present case, the court after considering the grounds of the application, objections of the claimant as well as submissions made by both parties, held that the company's application to amend its SIR be allowed except for paras 3.13, 3.13.1, 3.13.2, 3.13.3, 3.13.4, 3.14 and 3.15 of proposed ASIR. The claimant was also allowed to file a rejoinder if she so wishes.

[22] The reasons for my decision of not allowing paras 3.13, 3.13.1, 3.13.2, 3.13.3, 3.13.4, 3.14 and 3.15 of the proposed ASIR are as follows. In this case it is undisputed by both parties that the discovery of the alleged misrepresentation on the part of the claimant by the company was after the dismissal of the claimant.

[23] In the oft quoted FC case of *Goon Kwee Phoy (supra)*, Raja Azlan Shah, CJ (Malaya) (as His Royal Highness then was) held as follows:

> "Where representations are made and are referred to the [IC] for enquiry, it is the duty of [IC] to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the [IC] will be to inquire 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 inquiry of [ICJ is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.**"
>
> [Emphasis Added].

[24] In the case of *Boston Deep Sea Fishing (supra)*, it was decided that as long as the misconduct of the employee was such that if known, it would have amounted to such misconduct as would have justified his dismissal, the employer could rely upon it as justifying the dismissal of the employee even if the employer dismissed the employee on other grounds which would not of themselves have justified the dismissal. At common law, the effect would be that it is sufficient if a valid reason for dismissal in fact exists even if the employer be not aware of it at the time of dismissal. However, in *W Devis & Sons Ltd v. Atkins* [1977] 3 All ER 40, the House of Lords held *inter alia* that:

> "(i) On its true construction, para 6(8) of schedule 1 to the Trade Union and Labour Relations Act 1974 did not enable a tribunal, in determining whether a dismissal was fair, to have regard to matters of which the employer was unaware at the time of dismissal and which therefore could not have formed part of his reasons or dismissing the employee. Accordingly, evidence of misconduct which had been discovered after the employee's dismissal was irrelevant and inadmissable in determining, under para 6(8), whether the employers had acted reasonably in treating the reason for which the employee had been dismissed as a sufficient reason for dismissing him. It followed that the tribunal had been right to exclude the evidence of misconduct discovered

after the employee's dismissal for, assuming that the misconduct had occurred, it could not have influenced the employer's action at the time of the dismissal."

[25] The application in this case falls squarely within the case of *Styrotek Industries Sdn Bhd v. Thiang Yam Mee* [2001] 2 MELR 38 ("*Styrotek Industries Sdn Bhd*"). In *Styrotek Industries Sdn Bhd*, the learned Chairman of IC held as follows at pp 41-42:

"In our present case the company is seeking to amend the statement in reply to include a new ground which was discovered by the company after the dismissal of the claimant from her employment. She did not have the opportunity to defend herself against this allegation before she was dismissed. If the court can cure this gross breach of natural justice by hearing the evidence for the first time in the court, then it would open the floodgates to such breaches in future. Employers then will not further need to observe the rules of natural justice. They will be free to dismiss first and find the reasons later.

It is trite law that where an employer provides a reason for terminating the services of a workman, it is incumbent upon the employer to justify the same. (see *Goon Kwee Phoy v. J&P Coats (M) Bhd* [1981] 1 MLRA 415.) It would be inappropriate for the employer to come with other reasons after dismissal. The employer had already given its reasons for the termination of the claimant and it would not be prudent for the court now to enquire into other grounds subsequently put up by employer after the claimant was dismissed.

For the above said reasons and in the interest of justice, this court used its discretion not to allow the company's application to amend the statement in reply to add a new ground for the dismissal of the claimant."

[26] It is to be noted that the decision of *Styrotek Industries Sdn Bhd* has also been adopted by the learned author Dr Dunston Ayadurai in his book entitled *Industrial Relations in Malaysia, Law and Practice*, 3rd edn, pp 333-335).

[27] Finally, it is also the considered view of this court that it would not be in accordance with equity and good conscience as provided in s 30(5) IRA to allow inclusion of paras 3.13, 3.13.1, 3.13.2, 3.13.3, 3.13.4, 3.14 and 3.15 of the proposed ASIR [see *Chong Geok Cheng (supra)*].

Conclusion

[28] For reasons adumbrated above and having considered the grounds of the application as well as the objections and submissions made, bearing in mind the provision of s 30(5) IRA, it is therefore the decision of this court to allow the company's application to amend its SIR as in the proposed ASIR except for paras 3.13, 3.13.1, 3.13.2, 3.12.3, 3.13.4, 3.14 and 3.15 of proposed ASIR.