THAMBIRAJA ANNAMALAI

v.

MAMMOTH EMPIRE CONSTRUCTION SDN BHD

INDUSTRIAL COURT, KUALA LUMPUR
HAPIPAH MONEL
AWARD NO. 706 OF 2012 [CASE NO: 19(4)(22)/4-295/05]
31 MAY 2012

DISMISSAL: *Misconduct - Physical brawl and attempted theft - Whether misconducts proved on balance of probabilities - Whether justifying dismissal - Industrial Relations Act 1967, s. 20(3)*

The claimant was dismissed from his employment with immediate effect as a security guard with the company pursuant to cl. 12 of his letter of appointment. Clause 12 provided that the company was entitled to dismiss an employee immediately without notice or compensation if the employee was found to misbehave to the extent that the company's image was tarnished or to have caused financial losses to the company. The claimant was found to have committed some misconduct ie of being involved in a physical brawl and on an attempted theft at the construction site.

Held for the company (dismissal with just cause and excuse):

(1) The claimant was involved in a physical brawl at the site despite two prior warning letters issued to him pertaining to some misconduct committed by him during the course of his employment. The claimant was also detained by the police and acquitted thereafter. His acquittal without any criminal charge against him was not a relevant consideration that affected his dismissal. The claimant's acquittal also did not mean that he was not involved in the physical brawl (paras 27 & 28).

(2) The evidence showed that the claimant brought a lorry with a lorry driver to the company's construction site in an attempt to steal construction materials. There was clear evidence that the claimant committed the offence of theft or attempted theft which was serious in nature (para 32).

(3) The company experienced frequent theft cases which caused substantial financial losses to the company after the claimant was employed as the security guard. However, the company did not terminate the claimant immediately at the material time but instead issued warning letters to him. Notwithstanding, the claimant did not improve his performance. He conducted

himself in a way inconsistent with the duties given to him as a security guard. As a result, the company lost its confidence in the claimant. The said misconducts necessitated the company to terminate the claimant immediately in order to protect the company's interest (paras 64, 66, 67 & 71).

(4) The company was entitled to terminate the claimant's employment by giving one day's notice pursuant to cl. 12 of his letter of appointment due to his misconducts which tarnished the company's image and caused financial losses to the company (para 63).

(5) The claimant acted in breach of his duties owed to the company as his employer. His conduct made it unsafe and unreasonable for the company to keep him in his employment as a security guard. The company successfully proved on the balance of probabilities that the claimant was guilty of gross misconducts which justified the claimant's dismissal (para 81).

(6) Domestic inquiry was not necessary in the circumstances of the case in view of the clear proof that the claimant was involved in the physical brawl and the theft case which were very serious misconducts amounting to criminal offences. In any event, it was not compulsory for the company to hold a domestic inquiry before the dismissal of the claimant. Therefore, any failure by the company to hold a domestic inquiry was not fatal (paras 82 - 85).

Award(s) referred to:

A Jayandaran Arumugam v. Finisar Malaysia Sdn Bhd [2010] 2 LNS 0649 (Award No. 649 of 2010)

Bata (M) Bhd Kelang v. Ch'ng Soon Poh [1984] 1 ILR 227a (Award No. 12 of 1984)

MSAS Cargo International (M) Sdn Bhd v. Rajaratnam MK Rajan [1994] 2 ILR 1030 (Award No. 461 of 1994)

Osman Hitam v. Petronas [2010] 2 LNS 1383 (Award No. 1383 of 2010)

Pantas Cerah Sdn Bhd v. Lau Boon Seng [1999] 3 ILR 216 (Award No. 596 of 1999)

Press Metal Berhad v. Mustafa Ngamil & Anor [2007] 3 ILR 251 (Award No. 1120 of 2007)

Projek Lebuhraya Utara-Selatan Bhd v. Ahmad Nazir Hussein [2000] 1 ILR 189 (Award No. 47 of 2000)

Soil Dynamics (M) Sdn Bhd v. Yong Fui Kiew [2005] 2 ILR 817 (Award No. 1079 of 2005)

Taiko Plantations Sdn Berhad, Negeri Sembilan v. Ragawan Raman Nair & Anor [1994] 2 ILR 75 (Award No. 234 of 1994)

Case(s) referred to:

Abdul Kadir Mohamad v. Kamarulzaman Mohd Zin & Anor [2001] 5 CLJ 249

Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case [1995] 3 CLJ 639

Amanah Butler (M) Sdn. Bhd v. Yike Chee Wah [1997] 2 CLJ 79

Chong Khee Sang v. Pang Ah Chee [1983] 1 LNS 57

Fadzillah @ Fadzil Abu v. Secom (Malaysia) Sdn Bhd [2010] 2 LNS 0576

I Bhd v. K A Sandurannehru Ratnam & Anor [2004] 5 CLJ 460

Mohd Khair Johari Abd Rahman v. Perak Textile Mills Sdn Bhd [2010] 2 LNS 0285

Nuri Asia Sdn Bhd v. Fosis Corporation Sdn Bhd [2006] 5 CLJ 307

Pearce v. Foster (1886) (71) QBD 536

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147

Sil Ad (Johor Bahru) Sdn Bhd v. Hilton Oswald Franciscus [1998] 3 CLJ 233

Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314

Other source(s) referred to:

Smith & Wood, *"Industrial Court"*, 4th edn, p. 309

For the claimant - A Sivanesan; M/s A Sivanesan & Co

For the company - Alvin Lai (Liong Chor Soon (PDK)); M/s Sidek Teoh Wong & Dennis

Reported by Usha Thiagarajah

AWARD
(NO. 706 of 2012)

Hapipah Monel:

Facts

[1] The claimant was employed by the company as Security Guard on 1 April 2002 by letter of appointment dated 29 July 2002 (p. 1-4 COB1), cl. 12 of the Letter of Appointment provides that:

> If an employee is found to misbehave to the extent that the company's image is tarnished or to have caused financial losses to the company, the company is entitled to dismiss the employee immediately without notice or compensation.

[2] The company then terminated the claimant with immediate effect. After the company had reviewed the claimant's performance and the company had evidence to believe that the claimant had committed some serious misconduct, ie. physical brawl and the attempted theft at the construction site.

A **When Was The Claimant's Employment With The Company Terminated**

[3] The claimant in his Amended Statement of Case (SOC) alleged that he was only verbally terminated on 9 September 2004. However the company's contention is that the claimant was terminated on/about 6 August 2004.

[4] COW1 (the company's director) has testified that he personally handed over the said Notice of Termination (p. 10 COB1) to the claimant in the early August *ie* on/about 6 August at the site. COW1 also testified that on the same day when the said Notice of Termination was given to the claimant, the claimant had asked for some money from COW1.

[5] Out of compassion, COW1 gave him about RM100 from his own pocket. Subsequently COW1 had made a claim from the company in respect of the money advanced to the claimant. It can be shown from the Payment Voucher dated 4 September 2004 (p. 7 CLB2) which shows that RM100 was paid to the claimant on 6 August 2004.

[6] Even though the company paid the claimant the salary for August 2004 (p. 7 CLB2) it does not mean that the claimant worked until the end of August 2004.

[7] The EA Form (p. 8 CLB2) shows that the "tarikh berhenti kerja" on 31 August 2004; This is only for purpose of payment of salary and do not reflect the actual date of termination.

[8] It was explained by COW1 during his examination in chief that:

Q : Why the company still paid the claimant the salary for the month of August 2004?

A : Although he was terminated effective by 7 August 2004, out of compassion to the claimant, the company paid him a full month salary for August despite the claimant's dismissal in early August 2004.

[9] COW1 further testified in his re-examination as follows:

Q : Why the salary for the August 2004 was paid to the claimant, when the letter of termination was handed to him on 6 August 2004?

A : This is the discretionary matter.

Q : Page 8 CLB2 referred, is it true that the termination date is on 31 August 2004?

A : This is for our purpose of salary only.

[10] In fact, the claimant admitted that he did not work for the whole August 2004 (he was allegedly under the police remand for 5 days). But, the company still paid him the whole salary without deduction for August 2004. This shows that the payment of the salary is the company's discretion.

[11] Even if the termination date was 31 August 2004 (as shown in the EA Form), it also does not support the claimant's contention that he was allegedly terminated on 9 September 2004. In fact, the claimant did not receive any salary for September 2004. If indeed the claimant was only terminated on 9 September 2004, why the claimant did not claim for September 2004 salary?

[12] Further , it is also misconceived for the claimant to allege that the notice of termination dated 2 August 2004 was only given to him during the Conciliation Meeting at Jabatan Perhubungan Perusahaan on 28 October 2004. If indeed he was already terminated on 9 September 2004, then there is no point for the company to terminate him again on 28 October 2004.

[13] Apart from that, the claimant himself had previously admitted that he was told to leave immediately upon the letter being given to him. It can be seen at para. 16(v) of the claimant's witness statement dated 29 May 2006 (at p. 15 of COB3 which was signed by the claimant) that:

Q : How much notice were you given?

A : One day from the date of the letter of termination. I was told to leave immediate upon the letter being given to me.

[14] Therefore, it is not possible that the said letter of termination was only given to him on 28 October 2004 during Conciliation Meeting.

[15] Therefore, the court agrees with the company's contention that the claimant's employment was terminated in early August 2004 *ie* on/about 6 August 2004 *vide* the said Notice of Termination.

Whether The Dismissal Of The Claimant Was With Just Cause Or Excuse

[16] The event leading to the dismissal of the claimant are as follows:

A i) The first warning letter dated 27 October 2003 (p. 8 COB1) was issued by the company to the claimant pertaining to some misconduct committed by the claimant during the course of his employment. The warning letter had listed down the following misconduct by the claimant:

B
- the company had received complaints from their sub-contractors that the claimant had collected protection money from the sub-contractor's employees;
- the company found that the claimant was absent from work C in many occasions without giving any prior notice to the company;
- the claimant also allowed trespassers to enter into the construction site without the company's approval/ permission.

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ii) 2 January 2004. The company's personnel discovered that the survey equipments, such as Floating Survey Level Instrument, Floating Theodolite and electrical hacker valued at approximately RM28,000 were missing from the store located E at the company's construction site and near the guard house. The claimant failed to perform his duty as a security guard to protect the company's property and belongings from being stolen.

F iii) 24 April 2004. The company's motorcycle bearing the registration number NAE 8156, which was last parked near to the claimant's guardhouse, was missing during the claimant's working hours from 19 April 2004 to 20 April 2004. Again, the claimant failed to protect the company's property from being stolen and also failed to report to the company.

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iv) 12 July 2004, the company issued another Warning Letter dated 12 July 2004 to the claimant because the company was not satisfied with the repeated reports of the loss of the materials at the construction site due to the claimant's negligence. This notice was served as a final warning notice to H the claimant and the company will take firm action against the claimant if similar incidents happen again.

v) 29 July 2004, after the final warning letter was issued, the claimant was involved in a physical brawl with another person I by the name of Balakrishnan a/l Muthuveeran (deceased) at the construction site resulting in body injuries to Balakrishnan.

vi) 1 August 2004, the claimant hired and brought a lorry together with a lorry driver to the company's construction site in an attempt to steal the construction materials from the site at night. It was witnessed by the company's supervisor, Jui Han Chuen (COW2) and the policeman, Encik Mohd. Noor Azam bin Abdullah (COW3).

vii) About 6 August 2004, the company terminated the claimant with immediate effect after the company had reviewed the claimant's performance and the company had convincing evidence to believe that the claimant had committed some serious misconduct, ie. the physical brawl and the attempted theft at the construction site.

Misconduct No. 1

[17] The claimant was involved in a physical brawl at the site despite the 2 warning letters dated 27 January 2003 and 12 July 2004 (pp. 8 & 9 COB1) were issued by the company to the claimant, the claimant did not show any improvement in his performance but he committed further serious misconducts at the construction site.

[18] On/about 29 July 2004, the claimant was involved in a physical brawls at the construction site with another person known as Mr. Balakrishnan a/l Nuthuveeran (who is deceased now - p. 1 COB3). The said physical fight had also caused injuries to Balakrishnan.

[19] Subsequently, the victim, Mr. Balakrishnan had lodged a police report dated 30 July 2004 (p. 7 COB1) in regards to the incident on 29 July 2004. In the police report, Mr. Balakrishnan complained that:

> ... tiba-tiba Raja terus memukul saya dengan kayu, saya cuba mengelak tapi tak sempat dan terkena bahu sebelah kiri dan peha kaki kanan saya pun terjatuh. Dia pun terus memukul saya dengan getah paip di bahagian belakang badan saya merasa sakit di bahagian bahu dan kaki. Dan datang ke pondok polis senawang untuk buat laporan.

[20] Further, it was also testified by both the company's witnesses, COW1 (the director) and COW2 (the site supervisor) in respect the incident on 29 July 2004. During examination in chief, COW1 testified that:

36Q : Was there any other misconduct committed by the claimant after the issuance of the said final letter dated 12 July 2004?

A : Yes. After the final warning letter was issued, the claimant was involved in a physical brawl with another person by the name of Balakrishnan a/l Muthuveeran at the construction site on or about 29 July 2004 and this resulted in body injuries to Balakrishnan a/l Muthuveeran.

37Q : Did anyone report this incident to you?

A : Yes. The site supervisor and the sub-contractor reported the incident to me.

38Q : Was there any police report lodged in regards to this physical brawl between the claimant and Balakrishnan a/l Muthuveeran?

A : Yes. Mr. Balakrishnan a/l Muthuveeran lodged a police at the Balai Polis Rahang. The said the police report made by Mr. Balakrishnan a/l Muthuveeran on 30 July 2004 can be shown at p. 7 of the company's Bundle of Documents.

[21] Further, during examination in chief, COW2 also testified as follows:

15Q : Do you have knowledge about the physical brawl between the claimant and another person by the name of Balakrishnan a/l Muthuveeran on or about 29 July 2004?

A : Yes. I met Balakrishnan a/l Muthuveeran after the incident and he was injured by the claimant after he was assaulted by the claimant at the construction site.

16Q : Do you know how and why the said physical brawl happened?

A : I was informed by Mr. Balakrishnan a/l Muthuveeran that the claimant harassed his wife in the first place. When Mr. Balakrishnan a/l Muthuveeran confronted with the claimant, he was assaulted by the claimant.

17Q : What happened to the claimant after the incident?

A : The claimant was arrested by the police after the incident.

[22] Apart from the testimonies given by COW1 and COW2, the police report dated 30 July 2004 (p. 7 COB1) also shows that it is very probable and plausible that the claimant was involved in the said physical brawl with Balakrishnan at the construction site on 29 July 2004.

[23] In *Nuri Asia Sdn Bhd v. Fosis Corporation Sdn. Bhd & Anor* [2006] 5 CLJ 307; [2006] 3 MLJ 249 at p. 254 the court held that:

> For this purpose, the police report lodged by SP1 may be used to determine the probability and plausibility of his oral evidence. The importance of a police report in providing evidence of what had actually transpired was stressed Mohd Tajuddin bin Salleh and then in Abdul Kadir bin Mohamad.

[24] In *Abdul Kadir bin Mohamad v. Kamarulzaman bin Mohd. Zin & Anor* [2001] 5 CLJ 249:

> ... the police report lodged by the first defendant can best be described as an "information relating to the commission of an offence" and according to the then Federal Court in the case of *MA Clyde v. Wong Ah Mei & Anor* (1970) 2 MLJ 183:
>
> > ... if a first information report contains an admission which is relevant to a claim in a civil action against him, it is admissible in evidence.
>
> I am acutely aware that the "first information report" cannot be described "as a sure touchstone by which the complainant's credit may invariably be impeached" (*Herchun Singh & Ors v. Public Prosecutor* (1969) 2 MLJ 202 211), but when viewed in the context of a civil proceeding, the importance of a first information report can never be doubted. In a running down case, precision in lodging a police report will go a long way in advancing one's case in a court of law.

[25] In an inconsistent pattern, the claimant *vide* para. 13 (viii) of his witness statement (CLWS1) alleged that:

a) Balakrishnan "mabuk dan menggunakan kata-kata kesat. Kemudian dia mengambil kayu untuk merosakkan rumah contoh. Saya tolak dia tepi lalu dia terjatuh dan cedera".

b) Kemudian saya membawa dia ke klinik untuk rawatan. Apabila doktor bertanya, dia menjawab dia jatuh dan cedera.

c) Balakrishnan "telah dihasut untuk membuat laporan polis oleh orang di mana ia dihalang oleh saya daripada mencuri barang kecil dan mencuri alat besi daripada kawasan pembinaan".

[26] The said statement by the claimant is just a bare allegation without any proof and inherently improbable based on the following reasons:

a) The claimant did not provide any proof and particulars in respect of his allegation ie who is the 'orang di mana ia dihalang oleh saya';

b) No police report is lodged by the claimant in respect of the claimant's version. If indeed the contents in the police lodged by Balakrishnan is incorrect and it was Balakrishnan who

'mengambil kayu untuk merosakkan rumah contoh', why the claimant did not lodge his own police report or at least report to the management of the company?

c) The claimant's version is clearly inconsistent with the police report lodged by Balakrishnan and highly improbable in the absence of a police report lodged or a report made by the claimant himself to the company;

d) Further, the claimant's version is not pleaded at all. He also did not file a rejoinder to reply to the company's statement in Reply (which had pleaded the claimant's involvement in the physical brawl). It is trite law that the parties are bound by their own pleadings even in the Industrial Court. In the case of *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79, which also adopted the view in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 (FC).

e) The claimant's counsel also did not put any question to the company's witnesses in respect of the claimant's allegation. The failure to cross-examine the company's witnesses in regard to the claimant's allegation is fatal and the claimant's deemed to have abandoned or prevented from raising the allegation in their case. The company's case is deemed not challenged by the claimant. Refer to the case of *Aik Ming (M) Sdn. Bhd. & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770.

[27] In the present case, the claimant was subsequently detained by the police in the lockup over the incident. This is not disputed by the claimant.

[28] Despite the claimant alleged that he was acquitted by the police without any criminal charge against him the said acquittal by the police is not relevant consideration and will not affect the dismissal of the claimant. The police acquitted the claimant or declined to bring a charge against him do not mean that the claimant was not involved in the physical brawl with Balakrishnan. The company dismissed the claimant because they have a genuine belief in the claimant's guilt which is based on a reasonable ground and available evidence that he was involved in the said physical brawl at the site.

[29] In *MSAS Cargo International (M) Sdn. Bhd. v. Rajaratnam M.K. Rajan* [1994] 2 ILR 1030 (Award No. 461 of 1994) where the court referred to *"Industrial Court"* by Smith & Wood, 4th edn at p. 309 as follows:

> Where the crime arises within the employment (the obvious example being theft or the employer's property) the employer's need to dismiss may appear to him to be more urgent, but at the same time the employee under suspicion must not be treated arbitrarily. The position as it has evolved (particularly since the decision of the *EAT British Home Stores Ltd v. Burchell*, approved by the Court of Appeal in *W. Weddell & Co Ltd v. Tepper*) is that the employer may dismiss if he has a genuine belief in the employee's guilt, which is based upon reasonable grounds; he does not have to be able to prove the employee's guilt and so provided the employer has his genuine belief it is irrelevant if the employee is later acquitted of the offence (or indeed if the police decline to bring charges).

[30] In *Taiko Plantations Sdn. Berhad Negeri Sembilan v. Ragawan Raman Nair & Anor* [1994] 2 ILR 75 (Award No. 234 of 1994) (at last page):

> The learned counsel has in his submission stressed on the importance of the criminal prosecution. A dismissal cannot be characterised as illegal and wrongful, and cannot be set aside even where a Criminal Court throws out a criminal case. It is for the company to justify its dismissal at the Industrial Court, independent of the result of the court of law. The eventual conviction or acquittal of both the claimants at the Magistrate's Court, Bahau, will not effect the dismissal.

[31] In view of the claimant's involvement in the said physical fight with Balakrishnan at the site, the claimant had committed an act which is inconsistent with the responsibility reposed on him as a security guard. The claimant had acted in breach of his duties owed to the company as his employer. His conduct had made it unsafe and indeed unreasonable for the company to keep him in his employment as a security guard. Therefore, the claimant had committed such gross misconduct which reasonably justified his dismissal.

Misconduct No. 2

[32] The claimant hired a lorry driver and brought a lorry to steal construction materials from the construction site. On/about 1 August 2004, the claimant even hired and brought a lorry with a lorry driver to the company's construction site in an attempt to steal construction materials from the site at night.

[33] The said incident was witnessed by the COW2 and a police officer known as Encik Mohd Nor Azam (COW3) who was patrolling near the construction site on 1 August 2004 at night.

[34] On/about 1 August 2004, COW3 made a telephone call to inform COW1 that the claimant together with a lorry driver were transferring out some materials from the construction site. Thereafter, COW1 immediately call COW2 and instructed COW2 to go to the site in order to check out what actually happened. When COW2 arrived at the site, the claimant fled from the scene.

[35] During the examination in chief (*vide* COWS1), COW1 testified that:

41Q : Was there any other reported loss of any construction materials at the construction site?

A : Yes. On or about 1 August 2004, the claimant hired and brought a lorry together with a lorry driver to the company's construction site in an attempt to steal the construction materials from the site at night.

42Q : Who discovered the incident?

A : There were 2 police officers who were on duty near the construction site at that time discovered the incident. The Senawang Police Station is just few kilometres distance from the construction site. One of the said police officers who is known as Encik Md. Nor also stayed around the area. I personally know him and always asked for his assistance to patrol more frequently at the construction site in order to ensure the safety at the site.

On 1 August 2004, at about 8.30pm, Encik Md, Nor called and informed me that he saw the claimant together with a lorry driver were transferring out some materials from the construction site. Thereafter, I immediately called Mr. Jui Han Chuen who was the supervisor at the site and instructed him to go the site in order to check out what actually happened there.

Subsequently, I was informed that the lorry driver was detained by the police officer whilst the claimant fled from the scene. When the lorry was stopped by the police, there were some construction materials in the wooden body of the lorry. This was also witnesses by Mr. Jui Han Chuen who was present at the scene at the material time.

43Q : Did the claimant obtain any prior approval from the company to hire the lorry to enter into the construction site?

A : No, he did not.

Q : Did you lodge any police report then?

A : I did not lodge any police report because the police officer was already present at that time and the lorry driver was innocent as the lorry was hired by the claimant from the lorry driver's employer and the lorry driver did not know that the lorry was hired for the claimant's own purpose to transfer out the construction materials from the construction site without the company's permission. In fact, the claimant was the main culprit involved in the said incident.

[36] The eye witness, COW2 also testified that:

18Q : Are you aware of any other reported theft case at the construction site in which the claimant was involved?

A : Yes. On or about 1 August 2004, the claimant hired and brought a lorry together with a lorry driver to the company's construction site in an attempt to steal some construction materials from the construction site at about 8.30pm.

19Q : Did you witness the incident at that time?

A : Yes. It was Sunday on 1 August 2004 and at about 8.30pm, I received a telephone call from Mr. Danny Cheah and he instructed me to go to the construction site immediately because he received a call from a police officer that there was a lorry moving out some construction materials from the site.

As I stayed near to the construction site, I immediately went to the construction site and checked out what happened there. Upon my arrival, I saw 2 police officers, the claimant and a lorry driver together with a lorry at the construction site.

The police officer immediately told me that the claimant said he has approval from the company to bring the lorry to the construction site and asked me whether it was true. After I informed the police officer that it was not true, the police officers immediately tried to detain the claimant but the claimant managed to escape and fled from the site. Thereafter, the police officers detained the lorry driver.

20Q : Did the claimant obtain any prior approval from the company to hire a lorry to enter the construction site?

A : No.

21Q : Did you see any stolen goods in the said lorry?

A : Yes. I saw some of the company's construction materials such as door frames, steel bars and plywood were in the wooden body of the lorry and ready to be transferred out from the construction site.

22Q : Did you ask the lorry driver whether the claimant was involved in the theft case?

A : Yes. The lorry driver informed me that the claimant hired the lorry from his employer to move out some materials from the construction site. The lorry driver was instructed by the claimant to collect the construction materials and placed it into the lorry. He did not know that it was done by the claimant without this company's prior approval.

23Q : Did you inform the company in regards to the theft case?

A : Yes. Subsequently, I reported the theft case to Mr. Danny Cheah Joi Yong who is Executive Director of the company. I informed Mr. Danny Cheah Joi Yong that the claimant was involved in the said theft case and fled from the scene.

[37] During the examination in chief, it was also testified and confirmed by another eye-witness, COW3:

S : Adakah awak ingat terdapat beberapa kes hilang barang pembinaan di tapak pembinaan tersebut pada masa itu?

J : Ada.

S : Pernahkah awak membuat rondaan pada masa itu?

J : Ada.

S : Masih ingat sekitar Ogos 2004, awak pernah telefon Danny Cheah memaklumkan tentang kes kecurian?

J : Ada.

S : Apa kejadian itu?

J : Sebelum itu, saya mendapat telefon daripada pekerja di kawasan pembinaan mengatakan ada sebuah lori masuk ke kawasan tersebut. Apabila kita sampai, dapat tahan lori di kawasan pembinaan tersebut yang dipandu oleh seorang lelaki Melayu. Masa kejadian tersebut, saya datang bersama dengan seorang kawan. Bila tahan, saya soal siasat driver lori tersebut yang namanya "Lan". Dia kata lori ini disewa oleh seorang lelaki India yang kami kenali yang bekerja sebagai 'security' di tapak pembinaan tersebut. Dalam lori itu, terdapat barang-barang pembinaan dan sebelum lori ditahan semasa itu lelaki India nampak kita terus naik motor. Kita kenal dia. Selepas itu saya menelefon Encik Danny memberitahu kejadian tersebut. Encik Danny kata dia akan menelefon 'supervisor' di Senawang.

S : Siapa lelaki India yang awak kata?

J : Dia adalah 'security' yang menjaga kawasan tersebut.

S : Adakah beliau di mahkamah hari ini? A

J : Ada.

S : Boleh tunjuk kepada mahkamah?
Yang menuntut dicamkan.

S : Awak tahu nama dia? B

J : Kita panggil dia "Raja" saja.

S : Sebelum kejadian itu, pernah awak nampak 'Raja'?

J : Saya memang telah lama kenal dia Raja. C

S : Adakah malam itu gelap?

J : Tidak, ada cahaya lampu.

S : Awak boleh nampak? D

J : Boleh cam walaupun daripada belakang.

S : Masa awak tahan pemandu lori tersebut, adakah awak membuat pengesahan sama ada mereka mempunyai kebenaran membawa masuk lori ke tapak pembinaan? E

J : Ada.

S : Adakah mereka mempunyai kebenaran?

J : Saya diberitahu oleh syarikat tiada kebenaran lori masuk kawasan tersebut. F

[38] It is clear from the evidence that the claimant brought a lorry with a lorry driver to the company's construction site in an attempt to steal construction materials.

[39] The claimant fled from the scene whilst the lorry driver was G detained by the police officer. There were some construction materials in the wooden body of the lorry. Some enquiry was made and it was confirmed that the claimant hired the lorry to transfer materials from the site. It was also confirmed and corroborated by the evidence of COW2 and COW3 that the person, who fled from H the site, was the claimant in this case.

[40] In the present case, there are clear evidence that the claimant had committed an offence of theft or attempted theft which is serious in nature and also justified the company to dismiss the claimant. I

[41] In *Fadzillah @ Fadzil Abu v. Secom (Malaysia) Sdn. Bhd* [2010] 2 LNS 0576. This is a case where the claimant alleged to have unloaded a full set of security equipment at an unauthorised premise at Bukit Jelutong Shah Alam on 11 February 2004, at 17.30 hours in the presence of the colleagues which amounts to stealing if for personal gain. In deciding whether the misconduct constitutes just cause or excuse for the company to dismiss the claimant, the court has referred to the following cases and stated as follows:

> There are a number of cases where the court held that employees guilty of removing the company's goods without authorization are liable to dismiss as such conduct is criminal in nature.
>
> a) *Kerjaya Belfour Beatty Cementation Sdn Bhd v. Muhamad Zaki Mat Zin* [1999] 2 ILR 343 (at p. 334 of the report), the claimant in this case was charged with removing a container belonging to the company from its premises. An enquiry followed and the employee was subsequently dismissed.
>
> The court held that:
>
> When an employee is not authorized to take goods of his employer to his own possession and it is found at the time when he was going out of the workplace that he was carrying some goods of the employer, then in the absence of satisfactory explanation, the presumption is that he is guilty of theft.
>
> The present matter involved the offence of attempted theft by the claimant. It has been sufficiently proven that he had the intention to deprive the company of the container, which belonged to them. In law, even temporary deprivation of possession of goods would amount to theft. Theft or attempted theft is a serious offence.
>
> b) In the case of *Institut Senilukis Malaysia v. Chung Yi* [2003] 3 ILR 579 (at pp. 580 and 599 of the report), the claimant was alleged to have unlawfully removed certain paintings belonging to the company from the premises of the company. The claimant did not deny removing the painting. She argued she was not guilty of misconduct as the painting belonged to the former President of the Institute, he father.
>
> The court held:
>
> The claimant had committed a grave misconduct when she removed the painting without permission.
>
> Even assuming the painting belonged to her father, what the claimant did is considered serious misconduct.

c) *Okumura Metal (M) Sdn Bhd v. Aparahu Athinarayanan* [2003] 2 ILR 160 (at p. 161 of the report), the claimant was dismissed by the company for his alleged participation on the unauthorised removal of 200kg of copper and bronze scrap from the company.

The court held:

The claimant's conduct during and after the incident led to the irresistible conclusion that he was actively involved in the unauthorized removal of scrap from the company premises, thereby committing the alleged misconduct.

The misconduct justified the extreme penalty of dismissal as misconduct involving moral turpitude such as theft or assisting in theft could only be punished with dismissal. It is clear that the claimant breached the fiduciary nature of the employer/employee relationship in that his act was detrimental to the best interest of the company.

[42] In fact, from the claimant's witness statement (CLWS1), the claimant did not deny or challenge the evidence of the company at all in respect of the theft incident.

[43] The company had reasonable grounds and convincing proof for believing that the misconduct has been committed by the claimant.

[44] It is immaterial whether the claimant did it or not and/or later acquitted from the offence. The important point is that the company had a reasonable ground for believing that the said offence of attempted theft was committed by the claimant. (Refer case *I Bhd v. K.A. Sandurannehru Ratnam & Anor* [2004] 5 CLJ 460).

[45] The claimant was dismissed justly and fairly due to the misconducts committed by him. Not only was the claimant guilty of misconduct but he also failed to properly perform his duties and there was gross dereliction of duties on his part.

[46] All the company's witnesses testified and confirmed that the said theft incident took place on 1 August 2004 at night. COW2 also vividly remembered that the incident took place on Sunday which is on 1 August 2004. Therefore, at the time of the dismissal, the company had a reasonable ground and convincing evidence to believe that the claimant was actually involved in the said theft incident on 1 August 2004.

[47] However, it is the claimant's contention that he was under police remand from 1 August 2004 until 5 August 2004 to facilitate the police investigation in respect of the police report

made against him for his involvement in the physical brawl with Balakrishnan on 29 July 2004.

[48] The claimant relied on the letter dated 20 July 2007 (CLE1) issued by Polis DiRaja Malaysia and alleged that the claimant was under the police remand from 1 August 2004 to 5 August 2004.

[49] First of all, the maker (Ramlan b. Hj Abdul Razak P/DSP) of the letter dated 20 July 2007 (CLE1) was not called to give evidence to prove the contents of the letter. Further, the company is also deprived of the opportunity to cross-examine the maker as to the truth or accuracy of the contents of the letter ie. the dates of the remand.

[50] In *Chong Khee Sang v. Pang Ah Chee* [1983] 1 LNS 57; [1984] 1 MLJ 377, 382 it was held that:

> But so far as the contents of the documents are concerned the truth of the same has still to be proved, in the absence of any specific admission of the facts therein contained. That this is so may readily be appreciated when one considers 2 police reports in an Agreed Bundle each giving a diametrically opposite version of how an accident took place. The version of the accident is generally not agreed and in issue. To that extent the makers of the document may be subject to cross-examination to establish where the truth of the matter lies. So whilst it is not necessary to prove the documents, it would still be necessary to prove the truth of the contents of the documents.

[51] In *Osman Hitam v. Petronas* [2010] 2 LNS 1383 (Award No. 1383 of 2010) the Industrial Court held:

> In a situation where there is a crucial piece of evidence being disputed such as in this case, it is essential for the court to look for corroboration that could tip the balance of probability in favour of either party. It is also crucial for such evidence or statement be subjected to cross-examinations. Unfortunately, the maker or the sender of this e-mail was not called as witness to enable him to be cross-examined to test the credibility of the statement said to be made by him. In such a situation, the court holds that the evidence of the claimant which has been tested by cross-examination is of higher weight and value than an untested and unconfirmed statement which remains hearsay in nature. (emphasis added)

[52] In *A Jayandaran Arumugam v. Finisar Malaysia Sdn Bhd* [2010] 2 LNS 0649 (Award No. 649 of 2010), the Industrial Court held:

> Roslan himself was never produced before this court for the verification and testing of his statements and allegations. Interestingly, although reference to the impugned domestic inquiry is unavoidable here, he did not attend thereat either. Neither was any one called from "Institute Teknologi Negeri' of Seremban, Negeri Sembilan. It is trite that where documents are sought to be proved in order to establish the truth of the facts contained in it, the maker has to be called (see *R v. Gillespie* (1967) 51 Cr. App. Rep. 172; *R v. Plumer* (1914) R & R 264; *Hill v. Baxter* (1958) 1 QB 277; *R v. Moghal* (1977) Grim LR 373). Non compliance with this settled law will render the contents of the documents as hearsay.
>
> (emphasised added)

[53] Therefore, since the maker of the letter dated 20 July 2007 (CLE1) was not called to give evidence, the evidence of the Company which has been tested by cross-examination is of higher weight and value than the untested and unconfirmed contents of the letter (CLE1) which remains hearsay in nature.

[54] In respect of the claimant's witness, Chief Inspector Azrol Hashim Bin Mohd. Shaffie (CLW1), he is not the maker of the letter dated 20 July 2007 (CLE1) and he has no personal knowledge at all pertaining to the purported dates of the remand.

[55] Further, CLW1 was not in service at the Seremban Police Station when CLE1 was issued by 'Ketua Bahagian Siasatan Jenayah Daerah Seremban', Ramlah B. Hj. Abdul Razak. How can he now give evidence in respect of the purported dates of remand stated in CLE1 when he has no personal knowledge of CLE1. During the cross-examination, CLW1 testified as follows:

S : Semasa surat CLE1 dikeluarkan, kamu tidak bertugas di Seremban?

J : Ya.

S : Semasa surat itu dikeluarkan, setuju ia adalah kira-kira 3 tahun selepas kejadian berlaku?

J : Ya.

S : Tanpa rujuk rekod bolehkah kamu ingat kejadian ini?

J : Tidak boleh.

S : Siapakah yang tahan yang menuntut?

J : Anggota polis saya.

[56] Clearly, CLW1 himself has confirmed that he is unable to remember the actual date of the remand without referring to the letter (CLE1). CLW1 also failed to produce any other document to prove that the Claimant was under the police remand on 1 August 2004. Further, CLW1 also confirmed that he is not involved in detaining the claimant. Therefore, the testimony of CLW1 as to the dates of the police remand carries no weight and value.

[57] Further, the testimony given by CLW1 during the cross-examination is also inconsistent with the contents of the police report No. Rahang/005754/04 dated 30 July 2004 lodged by Balakrishnan (p. 7 of COB1) when he was asked about the date of the incident (the physical brawl). This can be shown from CLW1 testimony as follows:

S : Bilakah kejadian tersebut?

J : Repot pada 30 Julai 2004. Kejadian berlaku seminggu sebelum repot dibuat.

S : Dalam report kata sehari sebelum?

J : Saya silap. Kejadian sehari sebelum report dibuat.

S : Kamu tidak ingat tarikh tepat kejadian berlaku?

J : Setuju.

[58] From the aforesaid, the testimony of CLW1, it shows that he is not sure and cannot remember the actual date of the incident when he said the incident (physical brawl) took place one week before the police report lodged on 30 July 2004. In actual fact, the police report (p. 7 of COB1) shows that the physical brawl took place on 29 July 2004 which is one day and not one week before the police report lodged on 30 July 2004.

[59] Based on the aforesaid, CLW1 was probably unable to remember the actual date and time of the remand since the event took place in year 2004. At most, CLW1 can only prove that the claimant was under police remand but he cannot prove the actual date and time of the police remand.

[60] The letter dated 20 July 2007 (CLE1) also carries no weight since the maker did not come to court to confirm and verify its contents. It could be mistake made as to the date of the remand. From the said letter, the time of the arrest is also not specifically stated therein. It is possible that the claimant was only detained by the police after the theft incident took place ie. at about 8.30pm on 1 August 2004.

[61] Further, the letter (CLE1) is not a contemporaneous document as the letter is dated 20 July 2004 which was only issued 3 years after the purported remand and dismissal in 2004. On the other hand, the company's evidence is supported by the police officer (COW3) who are the eye-witnesses and all the company's witnesses have consistently confirmed that the claimant was seen at the construction site at night on 1 August 2004 together with the lorry driver.

[62] Based on the aforesaid, the issue of the police remand cannot assist the claimant in this case and it is inherently more probable from the evidence that the claimant was involved in the theft incident.

[63] The company is entitled to terminate the claimant's employment by giving one day's notice pursuant to cl. 12 of Letter of Appointment (p. 3 COB1) due to his misconducts which had tarnished the company's image and caused financial losses to the company. Clause 12 clearly states that:

> If an employee is found to misbehave to the extend that the company's image is tarnished or to have caused financial losses to the company, the company is entitled to dismiss the employee immediately without notice or compensation.

[64] Further, prior to the final warning letter dated 12 July 2004 was issued, the company also experienced frequent theft cases which had caused substantial financial losses to the company after the claimant was employed as the security guard.

[65] In *Pearce v. Foster* (1886) (71) QBD 536, Lord Esher MP held:

> If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is to be prejudicial or is likely to be prejudicial to the interest or to the reputation of the master, and the master will justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant.

[66] However, the company did not terminate the claimant immediately even though there were repeated theft cases at the construction site. In fact, the company had issued the warning letters dated 27 October 2003 and final warning letter date 12 July 2004 to the claimant prior to the termination.

[67] However, the claimant did not improve his performance. Instead, he conducted himself in a way inconsistent with the duties given to him as a security guard ie. he committed the Misconduct No. 1 (the physical brawl) and No. 2 (the theft incident) above.

[68] In *Pearce v. Foster* (*supra*), Lord Esher Mr observed:

> The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with the due and faithful discharge of his duty to his master, the latter has the right to dismiss. The relation of master and servant implies necessarily that the servant be in a position to perform his duty and faithfully, and if by his own act prevent himself from doing so, the master may dismiss him.

And Lopes LJ in the same case stated as follows:

> If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconducts which justifies immediate dismissal.

[69] In *Mohd Khair Johari Abd. Rahman v. Perak Textile Mills Sdn. Bhd* [2010] 2 LNS 0285, the learned Chairman has referred to the following cases in delivering the judgment:

i) *Soil Dynamics (M) Sdn Bhd v. Yong Fui Kiew* [2005] 2 ILR 817 (Award No. 1079 of 2005).

> ... the relationship between an employer and an employee is a fiduciary character and if the employee does an act which is inconsistent with the fiduciary relationship then be an act of bad faith for which his services can be terminated ...

ii) *Projek Lebuhraya Utara-Selatan Bhd v. Ahmad Nazir Hussein* [2000] 1 ILR 189 (Award No. 47 of 2000), it was held:

> (1) in the light of the decision in *Feroda*'s case, the company had the reason or cause to terminate the claimant's services due to his failure and carelessness in carrying the trust reposed in him in protecting and taking care of the safety of company's property by losing the 200 reserved class 3 tickets and the extra two remake tickets which were not accountable, without giving any reasonable excuse. Not only did the company have a rational reason or cause, in fact it was clear that a criminal breach of trust has been committed.

[70] In *Pantas Cerah Sdn. Bhd v. Lau Boon Seng* [1999] 3 ILR 216 (Award No. 596 of 1999), it was held that:

> When an employer employs an employee, it is implied the employee will faithfully with loyalty and honesty further the

> interest of the employer. There is a fiduciary relationship between the employer and the employee. AN employee, under the payroll of the employer should not do any act which causes detriment to the interest of the employer.

[71] As a result, the company had lost its confidence on the claimant. The said serious misconducts had also necessitated the company to terminate the claimant immediately in order to protect the company's interest.

[72] In this regards, the company had issued the Notice of Termination dated 2 August 2004. In the first paragraph of the Notice of Termination dated 2 August 2004 (p. 10 COB1), the company had also referred to both the previous warning letter dated 27 October 2003 and 12 July 2004 (pp. 8 & 9 COB1) which consists of the grounds and/or reasons for the claimant's poor performance.

[73] In fact, prior to the termination, the company had *vide* the final warning letter dated 12 July 2004 (p. 9 COB1) specifically informed the claimant that:

> The management is not happy about the repeated report of loss of material at our project site from our site personnel due to your negligence.
>
> This serve as a final warning letter, if the above incidents happen again, the management will not tolerate this.

[74] After the final warning was issued, the claimant committed further misconducts. The company had no choice but to terminate the claimant because the claimant's further misconducts can no longer be tolerated by the company. The claimant was guilty of such misconduct as to make it unsafe and indeed unreasonable for the company to keep him in his employment as a security guard.

[75] The termination was also justified in fearing that it firm action is not taken against the claimant, such cases of theft and physical fight at the site might increase later.

[76] In *Press Metal Berhad v. Mustafa Ngamil & Anor* [2007] 3 ILR 251 (Award No. 1120 of 2007):

> Having thus considered the totality of the evidence, the court finds, on a balance of probabilities, that the respondent did entertain a reasonable suspicion amounting to a believe that the claimants were involved in the thefts of its raw material, that it had reasonable grounds to sustain such belief ie from the facts

> garnered by COW2, that it had carried out as much investigation into the matter as was reasonable in all the circumstances of the case, and that as a result of such investigation the respondent did have sufficient facts in its possession which afforded reasonable grounds for it to lose its trust in the claimants. It was also justified in fearing that if firm action was not taken against the claimants, such cases of theft might increase. The court therefore finds that the claimant's dismissal was for just cause and excuse.

The Law

[77] In a dismissal case, it is the burden of the employer to prove that the employee has committed misconduct which constitutes just cause and excuse for the dismissal of the employee. However, the standard of proof imposed on the company is on a balance of probabilities when hearing a claim of unjust dismissal, even if the ground for dismissal is one of criminal conduct as this is not a criminal prosecution.

Authorities

a) *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314; [2002] 3 MLJ 129 at pp. 137 & 141, the Court of Appeal.

b) *MSAS Cargo International (M) Sdn. Bhd v Rajaratnam a/l M.K. Rajan* [1994] 2 ILR 1030 (Award No. 461 of 1994) (*supra*) p. 7.

[78] In determining whether the dismissal was carried out with just cause and excuse, the court must consider based on the available evidence whether the company had reasonable grounds for believing that the misconduct/offence has been committed at the time of the dismissal of the claimant. The test applied in *Ferodo Ltd v. Barnes* (1976) ICR 439 is relevant here.

[79] The test applied in *Ferodo Ltd. v. Barnes* (1976) ICR 439 has been referred to in the following cases:

a) *Taiko Plantations Sdn. Bhd Negeri Sembilan v. Raqawan Raman Nair & Anor* [1994] 2 ILR 75 (Award No. 234 of 1994) (*supra*), it was held that:

> The prerogative to dismiss is, undoubtedly, a qualified prerogative and should be properly exercised to avoid interference by the Industrial Court, Once the employer has

convincing evidence that the workman is guilty of the offence and has acted reasonably in forming his view of the facts with a proper inquiry before making a decision to dismiss its decision should not be interfered. When an offence alleged is criminal in nature it is not necessary that an employer should wait for the outcome of the criminal proceedings against an employee before enquiring into a misconduct.

This court will now consider, in the light of the above facts and circumstances whether the company had reasonable grounds at the material time of the dismissal. It may be convenient to quote the test applied in *Ferodo Ltd v. Barnes* (1976) ILR 39 as follows:

> It must be remembered that in dismissing an employee including a dismissal where the reason is criminal conduct, the employer need only satisfy himself at the time of the dismissal, there were reasonable grounds for believing that the offence put against the employee was committed. The test is not whether the employee did it but whether the employer acted reasonably in thinking the employee did it and whether the employer acted reasonably in subsequently dismissing him.

For the reasons above stated this court is satisfied that the company had reasonable grounds for believing that the offence against the claimants was committed and uphold the dismissal of both the claimants. Their claims are therefore dismissed.

b) *I Bhd v. K A Sandurannehru Ratnam & Anor* [2004] 5 CLJ 460; [2004] 6 MLJ 127 (*supra*) where the Court held that:

> It must be remembered that in dismissing an employee including a dismissal where the reason is criminal conduct, the employer need only satisfy himself at the time of the dismissal, there were reasonable grounds for believing that the offence put against the employee was committed. The test is not whether the employee did it but whether the employer acted reasonably in thinking the employee did it and whether the employer acted reasonably in subsequently dismissing him.

And similarly in *British Home Stores Ltd v. Burchell* [1978] ILR 378 it was again emphasized that:

> In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct. In determining whether that dismissal is unfair an Industrial Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time.

[80] Similarly, the case of *Bata (M) Bhd Kelang v. Ch'ng Soon Poh* [1984] 1 ILR 227a (Award No. 12 of 1984) cited by the learned for the Chairman in their submission also emphasizes on the test of "reasonableness of the employer's decision to dismiss, judged in light of the facts known to the employer."

[81] In the present case, the company had reasonable grounds based on the evidence and facts known to the company for believing that the misconducts had been committed by the claimant. The company has successfully proven on the balance of probabilities that the claimant was guilty of gross misconducts which justified the dismissal of the claimant.

[82] Domestic Inquiry was not necessary in the circumstance of this case in view of the clear proof that the claimant was involved in the physical brawl and the theft case which was a very serious misconduct and indeed it amounted to criminal offences.

[83] In any event, it is not compulsory or a must for the company to hold a Domestic Inquiry before the dismissal of the claimant.

[84] In *Sil Ad (Johor Bahru) Sdn Bhd v. Hilton Oswald Franciscus* [1998] 3 CLJ 233 Abdul Malik Ishak J held that "there was no necessity for the company to conduct an inquiry before terminating the employment. It was sufficient for the company to lead evidence before the Industrial Court to show reasons for the termination. It is therefore respectfully submitted that the domestic inquiry being defective is not *ipso facto* fatal. The court is still at liberty to decide on the issue based upon evidence adduced." (emphasis added)

[85] Therefore, any failure by the company to hold a Domestic Inquiry is not fatal. It is sufficient for the company to lead evidence before the Industrial Court to show reasons for the dismissal. The court is still entitled to decide on the issue based on the evidence adduced.

Conclusion

[86] Based on the facts and evidence adduced in this case, the court finds that the company has established on the balance of probability that the claimant had committed the said misconducts which clearly and sufficiently constitute just cause and excuse for the claimant's dismissal. Accordingly, the claimant's case is hereby dismissed.