INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-519/04

BETWEEN

IT TRENDS (M) SDN. BHD.

AND

MANWINDER KAUR SIDHU A/P GURMIT SINGH

AWARD NO : 2082 OF 2005

Before	:	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue:	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	:	8.4.2004.
Dates of Mention	:	18.6.2004, 23.7.2004, 30.8.2004, 1.10.2004, 4.11.2004, 28.7.2005 and 29.8.2005.
Date of Hearing	:	21.9.2005.
Submissions	:	22.9.2005
Representation	:	Ms. L.L. Yap from M/s K.B. Chua & Co., Counsel for the Company. Mr. Vignesh Raju from M/s Vignesh Raju & Partners Counsel for the Claimant.

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Manwinder Kaur Sidhu a/p Gurmit Singh** (hereinafter referred to as "the Claimant") by **IT TRENDS (M) SDN. BHD.** (hereinafter referred to as "the Company").

AWARD

The Reference

1. Before me for resolution is a reference made on 8.4.2004 by the Honourable Minister of Human Resources. The reference is made pursuant to s.20(3) of the Industrial Relations Act, 1967 ('the Act'). It involves the dismissal from employment of Manwinder Kaur Sidhu a/p Gurmit Singh ('the Claimant') by her erstwhile employer, IT Trends (M) Sdn. Bhd. ('the Company'). The dismissal occurred on 23.3.2002.

The Narrative With A Pot-Pourri

2. The Claimant commenced employment with the Company on 24.9.2001. Her terms and conditions of employment was embodied in a letter to her from the Company bearing the title 'offer of employment'. That letter signed by the Company's managing director, also bears the signature of the Claimant showing acceptance of the same. To this letter were attached three documents called addendum A, B and C respectively. All these constituted the contract of employment of the Claimant and are exhibited from pages 1 to 7 of AB1, an agreed bundle of documents.

3. Of particular relevance in that contract of employment is that the Claimant was given the position of Regional Systems Consultant to perform duties detailed in addendum A at a commencing salary of RM3,000.00 per month subject to an initial probationary period of three months capable of being extended for another three months. Upon confirmation in employment, the salary was to be increased to RM3,500.00 per month. Other terms mentioned in the contract of employment are not of much significance to the issues posed save for those terms described in paragraphs 13(3) and (4) of the letter of offer of

employment and addendum B relating to the sales commission payable to the Claimant. I will refer to these in greater detail as the occasion demands.

4. Upon expiry of the initial period of probation, the Claimant was not confirmed in her appointment. At the end of the purported extended period of probation, the Company wrote to her a letter dated 12.3.2002 which shorn of its formalities read :

> *" RE: Non-Confirmation of Employment At End of Probationary Period (Extended)*
>
> ---
>
> *The Company wishes to inform you that despite a few sessions with you to discuss about your job performance as well as the extension of your probationary period for another three (3) months, your job performance is still well below the company expectation.*
> *In view of this, the company does not wish to confirm your employment with the company at the end of the extended probationary period. Your last day with the company will be March 23, 2002.*
> *We wish you all the best in your future endeavours. "*

No particular terms of art is required to indicate notice of termination of employment [per Lord Justice Clerk in ***Walmsley (appellant) v. C & R Ferguson Ltd (respondent)(1989) IRLR 122 CS***]. That letter effectively dismissed the Claimant from employment on 23.3.2002.

5. The reason extended by the Company for the dismissal is that her job performance was well below the expectations of the Company. The Company maintained in the Court this stand as stated in the dismissal letter. And correctly so. For this is what is demanded by the authority of ***Goon Kwee Phoy v. J & P Coats (M) Bhd. (1981) 2 MLJ 129(FC)***; that the Company cannot deviate from or enlarge upon that reason given in the dismissal letter.

6. The reason given by the Company for the Claimant's dismissal brings into the Court's scrutiny the job responsibilities expected of the Claimant. These are detailed in addendum A found at page 5 of AB1. There are ten responsibilities in all. Specifics as appropriate will come later in this award.

7. On all that I have stated thus far, the parties are on hallowed ground. It is accepted by both. Now to venture into desecrated grounds. Those facts which do not find total agreement between both parties. But before that, those souls paraded before the Court. The Company relied on the evidence of its sole witness, the Managing Director, Len Horng Jang ('COW1'). The Claimant, save for her testimony invited no other.

8. Also convenient would be to dispose of at this stage two issues raised by the parties.

9. First, on what transpired upon completion of the initial probationary period. The Claimant took the stand that she was not informed of her fate at the end of the probationary period. She presumed that she had been confirmed in her employment. COW1 avers that he had at a performance review session held at the end of the initial probationary period informed her of the extension of the probationary period for a further three months. Much skill was displayed by Ms. L.L.

Yap, learned counsel appearing for the Company, in extracting evidence both from COW1 and the Claimant to show that the Claimant was indeed under extension of probationary period after expiry of the initial probationary period. I find not the need to dwell upon these evidences and the submissions in this area by Mr. Vignesh Raju, learned counsel for the Claimant. Ms. L.L. Yap achieved her objective when with one fell swoop she quoted the decision of Raja Azlan Shah CJ (as His Royal Highness then was) in ***K.C. Mathews v. Kumpulan Guthrie Sdn. Bhd. (1981) 2 MLJ 320 (FC)*** where his Lordship held that a probationer remains a probationer until confirmed or terminated from that position by the employer. And this view, if I may add, Suffian LP repeated in ***V. Subramaniam & Ors. v. Craigiela Estate (1982) 2MLJ 317 (FC).*** There lie no evidence before me that the Company did either at the end of the Claimant's initial period of probation. So I find the Claimant to be under a period of probation up to the date of her dismissal.

10. Next, on that part of Ms. L.L. Yap's submission that a probationer has no right of tenure to her job. For authority on such a proposition, she relied upon the Industrial Court's decisions in ***Sime Hyundai Wood Industries Sdn. Bhd. (1994) 1 ILR 25; Soon Seng Industrial Products Sdn. Bhd. v. Metal Industry Employees Union (1988) 2 ILR 219; Tatt Giap Steel Centre Sdn. Bhd v. Jeffrey Ismail (2004) 2 ILR 126; Vikay Technoly Sdn. Bhd. v. Ang Eng Sew (1993) 1 ILR 90*** and ***Equatorial Timber Moulding Sdn. Bhd. Kuching v. John Michael Crosskey (1986) 2 ILR 1666.*** Mr. Vignesh Raju's response to all this was a one-liner to the effect that even a probationer has got security of tenure.

11. Ms. L.L. Yap's authories generally support her contention that a probationer holds no lien on the post that he is appointed to and that an

employer who is dissatisfied with a probationer may dispense with his services. But there runs one common thread in all these cases. This is the *cavet* that the dismissal can only be for good cause or excuse. And this I find to be in keeping with the decision in ***Khaliah bte Abbas v. Pesaka Capital Corp Sdn. Bhd. (1997) 1 MLJ 376 (CA)*** that a probationer enjoys the same rights as a permanent or confirmed employee and that his services cannot be terminated except for good cause or excuse. That point on a probationer not holding a lien to his position cannot translate into a *carte blanche* to the employer to whimsically terminate the services of a probationer. I am of the view that this point is more relevant to the Court in arriving at a decision on the reinstatement of a probationer who has been wrongfully dismissed.

12. The second of the two-fold function of the Court upon receiving a reference under s.20(3) of the Act is to determine whether the employer had just cause for the dismissal that he had effected. And in determining this in the case of a probationer, the decision in ***Khaliah bte Abbas (supra)*** behoves the essentiality of the requirement of *bona fides* in the dismissal. Wan Afrah JC (as her Lordship then was) is of a similar view in ***Hartalega Sdn. Bhd. v. Shamsul Hisham bin Mohd. Airni (2004) 3 MLJ 117***.

13. The Company's complaint is that the Claimant did not perform up to its required expectations. To determine whether this complaint of the Company is indeed *bona fide,* a good starting point would be to examine the job function of the Claimant. To repeat what I have said earlier, there were ten functions in all, listed in addendum A of the contract of employment. The job function is analogous to her designation of Regional System Consultant. COW1 in his witness statement repeated all ten responsibilities of the Claimant. In cross-examination he

maintained that increasing sales volume was the most important function of the Claimant. But he did not say that her job responsibility was limited to sales. And it is in this area of sales that he found her to be "poor and not satisfactory" and having "no initiative" in carrying out her duties and showing unwillingness "to improve on her performance." And on what he meant by these adverse comments, his answers in cross-examination being on point, is repeated :

> *"Q: (Refers to Q15 of COW1-W/S). Explain what you mean by 'poor and not satisfactory'?*
>
> *A: Based on a few criteria. One, was there any sales bring in to the Company. Two, was there any quotation, proposal given out. Three, how many new clients or prospect the Claimant has met."*

Later, continuing under cross-examination :

> *Q: (Refers to Q21 of COW-W/S). What do you mean by 'no initiative' and 'unwillingness'?*
>
> *A: Company is looking at the performance or output of the Claimant. Basically we are talking of the number of sales she bring in. The number of quotations or proposals the Claimant has given out. The number of new prospects or clients the Claimant has met.*
>
> *Q: What you meant by 'no initiative' and 'unwillingness' is that she could not bring in sales?*
>
> *A: One of the factor is sales. The others are proposals and quotations. As well as the new prospects or clients.*
>
> *Q: Wouldn't it all be in relation to sales?*
>
> *A: All these related to sales. "*

From this I conclude that the Company's real complaint against the Claimant was that she did not bring in sales. And where this is concerned, the Company produced a table of figures on sales commission

earned by its staff. The table showed that the Claimant did not earn any commission at all. And the Claimant in cross-examination agreed that she was not paid any sales commission during her tenure with the Company.

14. And now for the Claimant's response to all this. First, she concurs that her responsibilities were as listed in addendum A. On this, Mr. Vignes Raju submitted that as a Regional System Consultant the Claimant's duties was not sales alone but all else stated in the addendum A. He complained that the Company dismissed her merely because she did not bring in sales. I admit that I am moved by this submission. After all the Claimant was to perform ten functions which ties up with the position that she was offered. Of this, sales though the most important, is but one of them. It should therefore stand to reason that an assessment of the Claimant's job performance should correctly include all facets of her employment. Unfortunately no evidence was led by either party on how she performed her other functions. The only evidence in this area is that given by the Claimant in re-examination that she was only able to bring in one proposal because she also had to spend time providing technical support, making calls and performing other duties. COW1's testimony was restricted to the Claimant's performance in relation to sales and a necessary corollary to this was quotation, proposals and prospective clients. I am therefore left without the ability to estimate the Claimant's overall ability to perform all of her job functions.

15. On sales still. It is the Claimant's contention that she did introduce new customers but sales were closed only after her dismissal. She however could not name any of the customers, saying that she was unable to remember. On sales commission she maintained that these were payable only after the customers have paid the purchase price. As

for Mr. Vignes Raju, he attacked the veracity of the table on sales commission exhibited in AB1. I find not the need to enter into debate on that table. As to why, the answer is self evident in addendum B on that part relating to when sales commission becomes payable. No sales commission is due when products/services are sold at or below 5% of gross profit margin. Sales commission is also not payable when the total monthly sales value does not cover the monthly employment cost of the employee, that is, the cost of salary, statutory contributions, expense claims and others. In the circumstances I find the sales commission table *ex facie* unable to determine anything relevant.

16. Now, onn to the next complaint on initiative and unwillingness to perform. I find the evidence of the Claimant consistent with that of COW1 in that during her six months employment she prepared only one proposal and that she had not prepared any quotation for prospective customers. It is however common ground that she had made introductory visits in the company of both COW1 and other employees. That she had made travelling claims about three times per week is also a factor for my consideration in the area of complaint. For travelling claims arise from travel associated with work. COW1 described how a sale is to be pursued and concluded. He said :

> *"First you have to understand the product. Then you try to find out which are potential customers who will need that sort of product. Then one has to take the initiative to call these potential customers and introduce these products to them. Once you get the prospect interested, normally followed by a quotation or product demonstration. Then you close the deal. "*

From this it appears to me that the conclusion of a sale need not be instantaneous as in the retail trade. It is more of an affair spread over a

period of time. The conclusion of a sale is but the ultimate of a protracted procedure. And of relevance is that part of COW1's testimony in cross- examination which ran as follows :

> *"Q:* ***Put.*** *If a deal is not concluded it doesn't necessarily mean the Claimant is not doing her job?*
>
> *A:* *If all these steps are followed. If the deal are not closed, it may not necessarily mean that one is incapable. "*

Save for showing that the Claimant had not concluded any sales, I find the Company not to have discharged its burden in substantiating its position that the Claimant was unwilling to perform her duties or had no initiative in the performance thereof.

17. An employee possessed of shortcomings has to be told what these shortcomings are. Otherwise the employee will not know and thus will not be afforded an opportunity to improve. This is not just what is required of industrial jurisprudence but is sheer common sense and good management practice. I now explore this area where the Claimant and the Company are concerned. The Company contends that the Claimant was informed during performance review sessions that her performance was not acceptable. The Claimant denies this. The reviews not being properly documented or witnessed by any other, the Company was unable to discharge its burden of showing the same.

18. Next came that part on affording the opportunity of improvement to a poor performer. Such an act is smiled upon by the Court. It is common ground that the Claimant was given training. The training took the form of accompaniment of the Claimant with COW1 and other

employees on their visits to clients. But says the Claimant of these sessions :

> *"Q:* ***Put.*** *Although the Company provide you with all this training your performance during 6 months still not satisfactory?*
>
> *A:* *No. I do not agree. Because training provided was product based. And the skills I was lacking was sales-skills.*
>
> *Q:* *Agree that during probationary period, COW1 or other Company engineer-consultants have brought (you) along to meet Company existing clients?*
>
> *A:* *Yes I agree.*
>
> *Q:* ***Put.*** *Company in all this on-the-job training provide you the training apart from product training. They have also trained you, the skill to sell the product?*
>
> *A:* *I do not agree because such visits are introductions. They do not teach me how to pursue a client for sales. "*

I find the evidence produced by the Company seen from pages 12 to 63 of AB1 not to be of much assistance in determining the nature of training given to the Claimant. Though the Company calls it an "Activities Logbook", it is in effect a diary with sporadic notes, the authors of which are not known.

19. That the burden is upon the Company to prove with cogent evidence the reasons it has given for the dismissal of the Claimant is trite law. It dispels me with the need of having to quote authority. The upshot of my discussion thus far is that the Company has lamentably been unable to discharge the burden imposed upon it. I must say that my sympathies lean towards the Company. In COW1's words, he is a

businessman and the managing director of the Company. The Company sells services and products related to the computer and ICT business. He had a total of five employees working for him, including the Claimant. Truly a small business enterprise, not unlikely in the throes of active competition. He employed the Claimant on probation to assess whether she suited his business requirements. No doubt she was given a grandeur designation – how else to attract young people to work. With an equally impressive job description. But COW1's objective was to bring in sales. But this was not reflected in the documentation that is, addendum A. And he too could not muster the necessary documentation and evidence to shew all those ingredients necessary to found a case for poor performance by an employee. He had other things to do. And understandably so.

20. But I have to pack my sympathies aside. My business is not to dispense sympathy but to dispense justice. Section 30(5) of the Act enables me to disregard technicalities and legal form. But this does not give me the freedom of adopting a cavalier approach to evidential burdens and other basic principles of evidence without which the science of justice cannot prevail. I bow to those higher principles of justice as against the common practicalities of humans in small business. Perhaps it is time to limit by size those employers against whom recourse can be had in the Industrial Court and instead confine them within the ambit of the Labour Court acting under s.69 of the Employment Act, 1955. But that is a matter within the wisdom of the Legislature to decide.

21. Back to dispensing justice, albeit as I see it. I now venture into that area of law known as legitimate expectations. Mr. Vignes Raju tackled COW1 vigorously on matters relevant. But he did not take the ball through to goal-mouth and beyond. He left mid-field. He has left me to score on my own steam. I do this with delight. I take the spurt in that

direction by first referring to several past decisions of the Industrial Court. The Learned Chairmen there did not take the route of legitimate expectations in arriving at their decisions. Be that as it may, the conclusions I believe, would not have been dissimilar had they adopted that route.

22. In ***Hong Leong Assurance Sdn. Bhd. v. Wong Yuen Hock (1990) 2 ILR 427*** the employer had in place a fixed disciplinary procedure. He did not however abide by it before dismissing the employee. And the Industrial Court held that failure to do so made the dismissal *ipso facto* unjust. Then came ***Sabah Bank Berhad, Kota Kinabalu v. Anthony Koshy, Kota Kinabalu (1993) 2 ILR 275.*** Here the employer had as part of the terms and condition of employment certain procedural requirements which he did not comply with when dismissing the employee. For this reason the Industrial Court found the dismissal to be without just cause and excuse. Just one more case to drive home the point - ***Pernas Construction Sdn. Bhd. v. Puranachandran @ Maniam a/l Nagapan (1994) 2 ILR 98*** where the Learned Chairman, Tan Kim Siong said that *"an employer with an agreed disciplinary or dismissal procedure ought to stick strictly to that procedure. Failure to observe this procedural aspect and on this score alone a dismissal can be unjust."*

23. On my journey in the direction of legitimate expectations, I find it a good starting point to quote Lord Templeman in ***Lloyd v. McMahon (1987) AC 625, (1987) 1 All ER 1118 HL*** where his Lordship said that *"legitimate expectation is just a manifestation of the duty to act fairly."*

24. And from thence I go onn to ***M. Sentivelu a/l R. Marimuthu v. Public Services Commission Malaysia & Anor (2005) 5 MLJ 393 (CA)*** where Gopal Sri Ram JCA speaking for the Court of Appeal referred to

the Supreme Court of Canada's decision in ***Baker v. Canada (Minister of Citizenship and Immigration)(1999)174 DLR (4th) 193.*** One passage there in the decision of L'Heureux-Dube J I find to be of help to me in the instant case. It goes like this :

> *"Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our court has held, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights :* ***Old St Boniface, supra, at p 1204, Reference re Canada Assistance Plan (BC) (1991) 2 SCR 525, at p 557.*** *As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the Claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness:* ***Qi v. Canada (Minister of Citizenship and Immigration) (1995) 33 IMM LR (2nd) 57 (FCTD); Mercier-Neron v. Canada (Minister of National Health and Welfare) (1995) 98 FTR 36; Bendahmane v. Canada (Minister of Employment and Immigration) (1989) 3 FC 16 (CA).*** *"* (underscore added).

25. An employee may have a legitimate expectation of being treated in a certain way. The expectation may arise from either a representation or a promise made by the employer. Closer at home, we have Arifin Zakaria JCA (now FCJ) speaking, on that same matter of legitimate expectations in a case on material facts totally unrelated to the instant case but on the principle of law exactly on point, in ***Zakiah Ishak v. Majlis Daerah Hulu Selangor (2005) 4 CLJ 77 (CA),*** that "*In law for legitimate*

expectation to arise there must be evidence of a promise or undertaking made by the respondent to that effect." In the instant case the Claimant was entitled to hold a legitimate expectation from a term of the contract of employment offered to her by the Company and which she accepted. And that term contained in paragraphs 13(3) and (4) of the letter of offer of employment reads :

> *"(3) In the event that the Company is of the view that you are incapable of discharging your duties, the following procedure will apply :-*
>
> *(a) First warning : The warning will be given in writing and will state that your work will be reviewed at the end of such period as the Company may deem fit after the date of the warning.*
>
> *(b) Final warning : This warning will be given to you in writing and will state that unless your work improves within such period as the Company may deem fit after the date of the warning, your employment will be terminated.*
>
> *(4) The Company reserves the right in its absolute discretion to waive any of the penalities referred to in Conditions 13 (2) and 13 (3) and substitute any one or more of the following penalities : -*
>
> *(a) Demotion – The Company may demote you by notice in writing giving details of any changes to your terms and conditions of employment arising from such demotion. In particular, the notice will give details of any reduction to your salary and/or loss of benefits and/or privileges consequent upon such demotion.*

(b) Suspension – The Company may suspend you with or without pay by notice in writing to this effect. Such notice will specify the dates of your suspension.

(c) Bonus – The Company may exclude you from participating in any bonus scheme by notice in writing to this effect. Such notice will specify the period of your exclusion from participation in the bonus scheme. "

26. COW1 confirmed that he did not comply with the requirements of paragraph 13(3)(a) and (b) in that no written first or final warnings conveying the message as envisaged were given to the Claimant. Nor was the Claimant instead penalised with any one of those actions stated in paragraphs 13(4) (a) to (c).

27. I hold that the Claimant had a legitimate expectation of being warned before her dismissal in the manner that she had contracted to be. That is by written warnings, the number and contents of which are fixed. The Company failed to do so. And in having so failed to carry out the very procedure that the Company had put in place, the Company failed in its duty to act fairly. The consequence is to turn the Claimant's dismissal to be without just cause or excuse. And I so find.

Remedy

28. Ms. L.L. Yap's authorities on a probationer holding no lien to the appointment shapes my decision not to order reinstatement of the Claimant in her former position. Backwages cannot therefore feature in the circumstances.

29. I am disposed towards giving a fixed compensation for the wrong which the Claimant as a probationer, had suffered. And this fixed sum I

equate to the approximate period, after taking into account the personal peculiarities of the Claimant, particularly her age and the type of employment she held, that she would require to secure alternative employment of an acceptable level. In the instant case I am of the opinion that a six month's period is realistic.

30. I therefore order that the Company pays the Claimant compensation amounting to six month's salary. That the Claimant was gainfully employed after two months from the date of dismissal does not deter me from this decision. For my decision is not based on the actual but on what is reasonably expected under the prevailing circumstances of the case. In arriving at this decision it is not lost on me that if I had followed the actual and ordered the payment of two month's salary as compensation, employers will not find it a deterrent to dismiss probationers and dismissed probationers would not find it an incentive to seek re-employment at the earliest opportunity.

Order

31. The Court orders the Company to pay the Claimant the sum of RM18,000.00, less statutory deductions if any, not later than 45 days from the date of this award.

HANDED DOWN AND DATED THIS 9TH NOVEMBER, 2005.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT