INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-173/02

BETWEEN

MALAYSIAN AIRLINE SYSTEM BHD.

AND

KARTHIGESU A/L V. CHINNASAMY

AWARD NO : 2230 OF 2005

Before	:	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue:	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	:	21.2.2002.
Dates of Mention	:	2.5.2002, 29.1.2003, 25.6.2004, 1.7.2004, 22.7.2004, 3.11.2004, 12.1.2005, 21.3.2005, 12.4.2005 and 5.9.2005.
Date of Hearing	:	2.7.2004, 18.7.2005 and 19.7.2005.
Oral Submissions	:	23.9.2005.
Representation	:	Mr. T. Thavalingam of M/s Zaid Ibrahim & Co. appearing for the Company. Encik Fadzil bin Abdullah (Mr. S. Mariappen with him) of M/s J. Azmi & Associates appearing 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 **Karthigesu a/l V. Chinnasamy** (hereinafter referred to as "the Claimant") by **Malaysian Airline System Bhd.** (hereinafter referred to as "the Company").

AWARD

The Reference

1. Before me for resolution is a reference made on 21.2.2002 by the Honourable Minister of Human Resources whilst exercising his powers under s.20(3) of the Industrial Relations Act, 1967 ('the Act'). It involves the dismissal by Malaysian Airlines System Bhd. ('the Company') of Karthigesu a/l V. Chinnasamy ('the Claimant') from his employment on 26.6.1999.

Representation

2. The Company was represented throughout the hearing by learned Counsel, Mr. T. Thavalingam. Mr. M. Periasamy from the Kesatuan Pekerja Sistem Penerbangan Malaysia first appeared to represent the Claimant and did so until the conclusion of the first day of hearing on 2.7.2004. Thereafter the Claimant was represented by learned Counsel, Encik Fadzil bin Abdullah. Evidence was led during the hearing on various matters. But the need to subject all that was laid before me to laborious scrutiny was dispensed with. Thanks to the candid response of both learned Counsel when I sought clarifications during their respective submissions. Their forthrightness enabled me to channel my decision making process in one direction alone.

Implementing The Court's Function

3. The Court's *mandatum* on receiving a reference under s.20(3) of the Act had been simply but precisely articulated by Salleh Abas LP in ***Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (1988) 1 MLJ 92 (SC)*** as follows :

> *" When the Industrial Court is dealing with a reference under section 20, the first thing that the Court will have to do is to ask itself a question* ***whether there was a dismissal*** *and if so* ***whether it was with or without just cause or excuse.*** *"* (emphasis added).

4. That there was a dismissal of the Claimant from his employment with the Company and that it was effected through service of the notice of termination found at page 5 of AB1 is a common position adopted by both parties. That notice brought about the cessation of the employment of the Claimant on 26.6.1999. This disposes that first function behoved upon me, that is to determine whether there was indeed a dismissal.

5. Now I move to the second of my functions, that is to determine whether the dismissal was for just cause or excuse. This is a three-step procedure beginning with the identification of the employer's reason for the dismissal, going onn to examine whether the employer had made out that reason in the Court and ending with whether that reason constituted just cause for a dismissal. (See ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Anor (1995) 3 CLJ 344) (FC)***.

6. The Company's reason for the Claimant's dismissal from employment is found in the notice of termination earlier referred to. The part relevant reads – *"We wish to inform you that the Company has now revised its plan relating to your assignment. In view of this development, the requirement of your position is no longer valid."* The Company's Human Resources Manager, Sakdon bin Kayon (COW2) repeated this in evidence and offered no further information on the reason for the Claimant's dismissal. Neither did the Company's three other witnesses

elaborate further on this matter. The Company relied on the Claimant's appointment letter which enabled the Company to serve upon the Claimant one month's notice of termination of contract. That there is no material difference between a termination of contract of employment by due notice and a unilateral dismissal of a summary nature has been unshakably established by the high authority of Raja Azlan Shah CJ (Malaya) (as HRH then was) speaking in the case of ***Goon Kwee Phoy v. J & P Coats (M) Sdn. Bhd. (1991) 2 MLJ 129 (FC)***.

7. In applying the three-step procedure that I have to embark upon in determining whether the Claimant's dismissal was for just cause or excuse, I find the Company to have merely exercised its prerogative found in the Claimant's contract of employment, that is to terminate by notice that contract. In doing so, the Company had dismissed the Claimant and had done so without just cause or excuse. And so I find. In arriving at this finding I find support in the case of ***Nik Omar Nik Man v. Bank Simpanan Nasional (2005) 4 CLJ 66 (CA)***. Though on material facts not relevant, I find the principle of law expressed therein exactly on point. In that case the reason given by the employer for the dismissal of the employee was as in the instant case, simply that his services were no longer required. And this is what Arifin Zakaria FCJ speaking for the Court of Appeal said :

> *" We do not think it is open to the respondent (employer) to terminate the service of the appellant (employee) simply on the premise that his service is no longer required without giving reasons for it. It should be realised that what the respondent purported to do would have dire consequences on the appellant. "*

The Claimant's Contract of Employment

8. Having decided that the Claimant's dismissal was without just cause or excuse, I now have to decide on the remedy to be accorded to him. Now, that turns on the prime issue of discontent between the parties. This involves the contract of employment between the Company and the Claimant. Though the direction of evidence led by Encik Fadzil bin Abdullah was initially unfocussed, both Encik Fadzil bin Abdullah and Mr. T. Thavalingam in submission stood on uniform ground on that the Claimant was employed under a fixed-term contract of employment. The law recognizes such contracts of employment which are capable of subsisting for a fixed duration of time (see the Court's decision in ***Malaysian Wetlands Foundation v. Devendiran S.T. Mani, (2005) 2 ILR 565***). Uniformity between the parties ended here. In dispute were two matters pivotal to the question of remedy to be administered in the instant case. This involved first, the duration of the fixed term contract and second, the salary to be paid to the Claimant for the duration of the contract.

9. There is a need, for a better understanding of the issues, to narrate at this point the chronology of events. The Claimant was originally in the employment of a company called Thorn Security Service (M) Sdn. Bhd., who was appointed by the Company to install a security-card-access-system at the Company's facility at the Kuala Lumpur International Airport in Sepang. Upon completion of the installation of the security system, the Claimant's employment with Thorn Security Service (M) Sdn. Bhd. ended. He then entered into discussion with the Company for employment. His discussion was held with the Company's Security Manager, Mohamed Suffian bin Abdul Malek who gave evidence as COW3. Later the Claimant attended an interview conducted by the Company which interview saw the presence of the Claimant, the Human

Resource Manager (COW2) and the Security Manager (COW3). After that, on the request of the Security Manager the Claimant, even before receiving an appointment letter from the Company, commenced employment with the Company on 1.3.1999. The Company then served a letter dated 2.4.1999 upon the Claimant. This letter constituted an offer of employment commencing on 1.3.1999 and laid out the terms and conditions of employment. The Claimant signed in a space on the last page of the letter and returned it to the Company. This he did on 16.4.1999. This he was required to do as stated in that letter to show acceptance of that offer of employment. For convenience I will henceforth refer to this letter as the 'fixed-term contract'. On that same date of 16.4.1999, the Claimant wrote the memorandum found at page 4 of AB1, addressed to the Human Resource Manager, acknowledging receipt of the fixed-term contract, thanking him for the same and stating that - *"Over and above, I would like to iron out a few issues with your goodself soonest."* He did not identify what those issues were. The Claimant subsequently wrote a memorandum, this time addressed to the Security Manager, dated 3.5.1999. That memorandum is found at page 9 of AB1. Amongst others, two matters relevant to the issues at hand were written by the Claimant there. Repeated verbatim :

> *" ... The issues to be ironed out with your goodself.*
>
> ▷ *The salary agreed was RM14,000. The amount stated in the offer is RM11,000.*
>
> ▷ *The minimum contract period agreed was 1 year. The period stated in the offer only six months. "*

What else he wrote in that memorandum, I have reason to mention later.

10. Then came the notice of termination of contract by the Company to the Claimant. That was on 20.5.1999. To this notice the Claimant replied the handwritten letter dated 8.6.1999 found at page 6 of AB1. The letter addressed to the Human Resource Manager, sought clarification on the date of termination of the notice and on the Claimant's annual leave. The Company's response, in two letters signed by the Human Resource Manager is found at pages 7 and 8 of AB1. The two replies fixed the Claimant's last date of employment at 26.6.1999 and clarified his leave salary respectively.

11. The parties are on common ground on all that is stated thus far. Now for the disputed areas. This on recapitulation, relates to the duration of the fixed term contract and the salary to be paid to the Claimant.

12. It is the Claimant's version that during his pre-employment discussion with the Security Manager, it was mutually agreed that he would be given a one-year contract and that he would be paid salary of RM14,000.00 per month. There were no others present during the discussion. The Security Manager's response to this is that he did not have the authority to decide on either and that he does not recall having agreed with the Claimant on the same. His position is that there was a discussion with the Claimant on the salary but he had not agreed to anything. It is the Human Resource Manager's evidence that it is only Human Resource that can decide on the salary of the Claimant and that the Security Manager held no such authority.

13. Encik Fadzil bin Abdullah referred to that part of the Industrial Court's decision in the case of ***Dorsett Regency Hotel (M) Sdn. Bhd. v. Azham Shah Mohamad Yusof (2002) 3 ILR 539*** where the Industrial Court spoke of circumstantial evidence. There the Industrial Court held

that evidence which is circumstantial has to be very strong and that such evidence must point irresistibly to the conclusion desired. I had occasion in the case of ***Guoy Consultancy Sdn. Bhd. v. Leo Albert Especkerman (2004) 3 ILR 629*** to discourse on circumstantial evidence. My findings there though in greater detail, are not dissimilar. As circumstantial evidence, Encik Fadzil bin Abdullah relied upon the Claimant's bare assertion, the two memorandums written by the Claimant relating to 'issues to be ironed out' found at pages 4 and 9 of AB1 and the fact that the Security Manager gave no firm denial when cross-examined on his purported promise to the Claimant on the duration of contract and the salary to be paid. With respect, I find the Claimant not to have succeeded in producing sufficient evidence to enable me to irresistibly arrive at the conclusion that the Company had indeed agreed through the Security Manager to give the Claimant a fixed term contract of one year at a monthly salary of RM14,000.00.

14. Instead, I find that the weight of evidence to be more consistent with the position that the Claimant's terms and conditions of employment were as stated in the fixed term contract. The Claimant in having commenced work without a formal appointment letter exposed himself to the risk associated with such an action. When he was later served with the fixed term contract he neither rejected it nor registered his protest. Instead he signed and accepted the fixed term contract on the terms stated therein. Furthermore he continued to work under those terms until his service was terminated.

15. I cannot attach much weight to the Claimant's memorandum to the Human Resource Manager on wanting to iron out a few issues for the reason that he did not mention what those issues were. The Claimant did not write that he objected to any term or even for that matter, that the terms did not reflect what had been earlier agreed. In this

connection I find it relevant that the Claimant after discussion with the Security Manager had to attend an interview with the Human Resource Manager; that the fixed term contract was offered to the Claimant on behalf of the Company by the Human Resource Manager; and that the Claimant's acceptance of the fixed term contract was addressed to the Human Resource Manager. The logical conclusion forced upon me from all this is that it is the Human Resource Manager who had the authority over employment. In the circumstances, that the Claimant chose to write to the Security Manager the memorandum at page 9 of AB1 on the salary and duration that were allegedly agreed, I find to be misdirected. He could have very well written these details to the proper authority who is the Human Resource Manager, but he chose not to. As to why, it is not known to the Court. That same memo dated 3.5.1999 also refers to acts which the Claimant called *'not pleasant and hurting'.* These acts summarized, is that on 15.4.1999 he was asked to resign, his access to the system was removed, staff were removed from under his supervision and one John was given instructions not to assist the Claimant in the compilation of certain works. That the Claimant wrote this memorandum after the alleged acts and that too he did not direct it to the Human Resource Manager puts to question his objective in writing the same.

16. Be that as it may, the fact cannot be escaped that the burden is upon the Claimant to bring cogent evidence, on a balance of probabilities, that the purported promise made by the Security Manager in relation to the duration of contract and salary payable did indeed become a term of his employment (see ***s.101 and s.103 of the Evidence Act, 1950)***. He failed in this.

17. The upshot of all this is that I find the Claimant's terms and conditions of employment to be as stated in the fixed term contract. And

that is for a period of six months from 1.3.1999 to 31.8.1999 at a salary of RM11,000.00 per month.

Remedy

18. I had in ***Malaysian Wetlands Foundation v. Devendiran S.T. Mani (supra)*** held that the proper remedy involving a genuine fixed term contract of employment terminated for no good cause would be to award a fixed compensation based on that remuneration that a claimant would have received for the estranged period, that is the period from the date of actual termination of employment to the date of determination of the fixed term contract. Such a computation would enable the claimant to be put in the original position that he would have been had he not been dismissed.

19. The Claimant's employment was terminated before term on 26.6.1999 instead of on 31.8.1999 as per his fixed term contract. The compensation payable to him should therefore be the salary he would have earned from 27.6.1999 to 31.8.1999. This amounts to RM23,466.66.

20. One of the Claimant's prayer in his pleadings is the restitution of an amount of money said to be unlawfully deducted from his salary by the Company. It is incumbent upon me to give life to that prayer, if justified. That deduction which the Claimant complained of is reflected in the Company's letter to him found at page 8 of AB1. The deduction involved four days' salary for the reason that the Claimant was on *"medical leave from non approved clinics on 31 May, 09 June, 15 June and 16 June 1999."* Though the amount is not stated, it arithmetically computes RM354.84 for the one day in May 1999 (RM11,000 ÷ 31 days)

and RM1099.99 for the three days in June 1999 (RM11,000 ÷ 30 days x 3 days). The impugned deduction should add to RM1,454.83. It is the Company's plea that it is a policy of the Company that "*the salary of employees who procure medical leave from non-approved clinics would be recovered on the days the medical leave were procured for.*" Short of saying this the Company did nothing more. No such policy was produced in evidence, no list of approved clinics was shown nor was the relevant medical leave certificates produced. Against this is the Claimant's fixed term contract which made no mention of such a restriction nor compliance to any such Company policy. The burden is on the Company to prove that such a policy did indeed form part of the terms and conditions of the Claimant's contract of employment. This, the Company failed to do. So I must grant the Claimant's prayer. I therefore order the Company to pay the Claimant the sum of RM1,454.83 in this regard.

Order

21. The Court orders that the Company pays the Claimant through his solicitors on record the sum of RM24,921.49 less statutory deductions if any, not later than 45 days from the date of this award.

HANDED DOWN AND DATED THIS 1ST DECEMBER 2005.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.