

UNFAIR DISMISSAL: PROHIBITION AGAINST RELIANCE ON POST-DISMISSAL REASONS

CASE HIGHLIGHT

Employment Law

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The relationship between employers and employees are symbiotic and dynamic. In the ordinary course, both would work together for the benefit and improvement of each other. Nonetheless, more often than not, employers may dismiss the employees from service because of various reasons. If this happens, the employees then have a right to bring the dismissal to the Industrial Court to challenge it under section 20(3) of the Industrial Relations Act (IRA) 1967.

In this context of employment law particularly on the issue revolving unfair dismissal, the Federal Court in the case of *Maritime Intelligence Sdn Bhd v Tan Ah Gek* [2021] MLJU 2189 had the opportunity to decide on an interesting and vital leave question i.e. whether *the Industrial Court may consider the reasons advanced by the employer in its pleadings to justify a dismissal although such reasons were not given when the dismissal was carried out.*

Relevant Facts

The facts of the case can be summarised as follows. Maritime Intelligence (MI) is the employer and Tan Ah Gek (known as Jenny) was the Vice President for Services & Registrar at an educational institution owned by MI. At all material times, MI never disputed Jenny's qualifications and accreditations. In fact, the reasons for her dismissal did not relate to her qualifications at all. Instead, MI dismissed Jenny from service after the domestic inquiry panel found her guilty for misconducts (including undermining the authority of MI's director and behaving unprofessionally and unethically).

Jenny then brought the matter to the Industrial Court under section 20(3) of the IRA 1967 to challenge the dismissal whereby the court held that MI did not dismiss Jenny with just cause. One of the reasons is because in MI's pleadings, one of the grounds relied on by MI (which was raised for the first time) is that Jenny's qualification was not accredited, making her unqualified to hold her position as Vice President.

The apex court answered the leave question in the negative. The Industrial Court ought not to consider the grounds advanced by the employer in its pleadings, which did not form the basis of the dismissal in the first place.

In arriving at this decision, the Federal Court also discussed several important tenets of industrial jurisprudence. Firstly, it affirmed that the right of an employee to livelihood is a fundamental right prescribed under Article 5(1) of the Federal Constitution. Therefore, pursuant to section 20 and supported by Raja Azlan Shah CJ's remarks in *Goon Kwee Phoy v J & P Coats (M) Sdn Bhd* [1981] 2 MLJ 12, although an employer may terminate its employee's services (provided the employer carries out the termination in accordance with the contractual terms), the employee may still challenge the dismissal before the Industrial Court if he believes that the dismissal is without just cause.

When the challenge is made, the Industrial Court's main duty and function is to ensure that the dismissal must be premised on matters forming the basis of the dismissal (what caused the employer to dismiss the employee from service). Thus, any *post-dismissal* reason put forth by the employer in the Industrial Court proceeding which is not the reason for the dismissal, would not be justifiable. Much reliance was placed in the case of *Goon Kwee Phoy* above where the Federal Court declared that the Industrial Court is not entitled to rely on reasons given by the employer subsequent to the dismissal.

What if an employer does not provide any reasons for the dismissal in the first place? In such a case, it has been held that it remains incumbent on the Industrial Court to inquire whether the dismissal was made with or without just cause as it is its statutory duty to inquire into a dismissal.

Apart from this, the Federal Court was critical of the decisions made by the Industrial Court in *Time Magazine Sdn Bhd v Ganesan R S Ramasamy* [1994] 1 ILR 44, *Sugunasegari P S Suppiah v SAP Malaysia Sdn Bhd* [2011] 2 ILR 629 and *Raja Nazim Raja Nazuddin v Padu Corporation* [2019] 2 ILR 388 which were relied on the employer as these cases wrongly construed the ratio in *Goon Kwee Phoy* which could undermine the purpose of the IRA 1967, designed to protect employees. It would provide employers with a back door to add and enhance its grounds or basis for the dismissal during the court proceeding which were not the reasons for the employee's dismissal initially. This would be repugnant to the fundamental basis of industrial jurisprudence and it was rightly held to be bad law.

The Federal Court, through Nallini Pathmanathan FCJ, also addressed the issue of an absence of a domestic inquiry. Based on the decisions of *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Industrial Court of Malaysia* [1988] 1 CLJ 1 and *Wong Yuen Hock v Syarikat Hong Leong Bank Assurance Sdn Bhd & Anor Appeal* [1995] 2 MLJ 753, she remarked that the position under the law is that a failure to convene a domestic inquiry is not fatal to the employer's case because they could still justify the dismissal during the hearing. However, that does not mean the employer is at liberty to put forward reasons not provided at the time of dismissal.

Based on these principles, the question that would arise is whether the Industrial Court is absolutely prohibited from considering post-dismissal facts during the trial? The Federal Court answered this in the negative. It was of the view that in certain circumstances, it would be permissible such as where the employer discovered after the dismissal that the employee had also committed a criminal offence such as theft or breach of trust. In such case, the Industrial Court may take cognizance of the facts and consider them in deciding the appropriate reliefs to be given to ensure justice is balanced on both sides. As a result, an employee claiming for compensation in lieu of

reinstatement may not be awarded the compensation if the alleged criminal misconduct can be proven.

What can be taken from this useful guidance by the apex court's decision is that the Industrial Court serves to protect the rights of employees from being infringed by their employers by way of unfair dismissal. At all times, the employees' right to livelihood must be upheld as encapsulated under Article 5(1) of the Federal Constitution. Therefore, if any employer wishes to terminate the services of its employees, it must be supported with solid and reasonable grounds. An employer is not entitled to load on grounds at trial to bolster its decision to dismiss the employee in the first place to avoid its dismissal being viewed unfavourably.

This decision also serves as guidance to employers to ensure that proper consideration together with justified and cogent grounds are made known to the employee at the outset as the employee is constitutionally entitled to know the reasons for his loss of livelihood. Therefore, any steps taken towards dismissing an employee must be carefully done to protect the employer from liability.

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