INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-3029/04

BETWEEN

TETUAN B. S. SIDHU & CO.

AND

SHAMSIAH BINTI ASRI

AWARD NO : 227 OF 2006

Before	:	**N. RAJASEGARAN - CHAIRMAN** (Sitting Alone)
Venue	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Application	:	29.7.2005.
Dates of Mention	:	16.2.2005, 22.3.2005 and 30.8.2005.
Dates of Hearing	:	13.10.2005 and 27.1.2006.
Submissions	:	-
Representation	:	Dato B. S. Sidhu (Ms. Sharon Sidhu with him) of Messrs B. S. Sidhu & Co. Counsel for the Company. Mr. S. Shanker of Messrs S. Shanker & Associates Counsel for the Applicant.

Reference :

This is an application made under Section 29(g) of the Industrial Relations Act, 1967 to reinstate a reference made under section 20(3) of that Act arising out of the dismissal of **Shamsiah binti Asri** by **Tetuan B.S. Sidhu & Co.** which reference had earlier been struck off.

AWARD

Background

1. Shamsiah binti Asri ('the Applicant') was dismissed by her erstwhile employer, Tetuan B.S. Sidhu & Co. ('the Firm') on 25.3.2003. Being aggrieved by the dismissal, she appealed to the Minister of Human Resources ('the Minister') under section 20 of the Industrial Relations Act, 1967 ('the Act'). The Minister acting under that same section of the Act referred the dismissal ('the Reference') to the Industrial Court ('the Court') on 21.9.2004.

2. The Court directed the Applicant to file her pleadings. She failed to do so. Neither did she attend two mentions called by the Court. In the event, upon application by the Firm's counsel, the Court struck-off the Reference through an award handed down on 3.5.2005, *to wit*, Award No. 890 of 2005 ('the Award').

Application

3. Before me now for resolution is an application made by the Applicant to reinstate for hearing in the Court, the Reference.

4. Dato B.S. Sidhu, ably assisted by Ms. Sharon Sidhu, both learned Counsel appearing for the Firm, vigorously opposed the application. Mr. S. Shanker, learned Counsel representing the Applicant, pursued the application with equal tenacity. The result, this application joined the roll of those rare applications of a similar nature which have been made the subject of challenge.

Evidence

5. The application was supported by the Applicant's affidavit to which the Firm responded with an affidavit in reply. This led to an affidavit in reply from the Applicant. And that prompted from the Firm an affidavit in reply to the Applicant's affidavit in reply. I have scrutinized the contents of all the affidavits and have included the same in my deliberations. I am also moved by the evidence of the Applicant, called to the stand at the insistence of the Firm, in the face of objection from Mr. S. Shanker which objection I had overruled. In doing so, I had borne in mind the principle that can be distilled from a decision of Salleh Abas FJ (as he then was) in ***Leisure and Allied Industries Pty Ltd. v. Udaria Sdn. Bhd. (1980) 1 MLJ 189*** where his Lordship faced with a similar objection held :

> *" **To allow or not to allow the respondent's application to cross-examine the appellant's witnesses upon their affidavits, I take it, is a matter of court's discretion.** In appropriate circumstances, there is no reason why such application should be refused merely because the deponent is a foreigner living outside the jurisdiction (Re Lucas [1952]1 All ER 102) : 'otherwise foreigners would have an advantage' (Strauss v. Goldschmidt 8 SLR 239). **It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit must be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause, vexatious or motivated by a desire to delay the proceedings** (Allen v. Allen [1984] P 239."* (emphasis added).

Court's Jurisdiction

6. It would be appropriate at this juncture to address that issue raised by Dato B.S. Sidhu in his affidavit in reply that the Industrial Court is not seized with express jurisdiction to reinstate a case. My answer to that is short. The Industrial Court had long since held that it possessed the jurisdiction to reinstate cases which it had earlier struck-off. This it is able to do pursuant to section 29(g) of the Act. That the Court is indeed possessed of such powers was subsequently settled by the binding authority of Siti Norma Yaakob J. (now Chief Judge, Malaya) in ***Bank Pusat Kerjasama Bhd. (In Receivership) v. Mahkamah Perusahaan Malaysia & Anor (1994) 4 CLJ 341.***

The issues

7. Now, to turn to the issues before the Court. At the hearing of 27.1.2006, consensus was arrived at between the parties that the issues confronting the instant application are as follows :

(i) Whether the application to reinstate the Reference had been made within time.

(ii) Whether the Claimant had good grounds for making her application.

I am indeed appreciative of the efforts by both learned Counsel in restricting evidence and submission to focus on these two issues.

Time Limit

8. First, on that issue relating to whether the application had been made within time. The order in the award reads as under :

> *" Mahkamah dengan ini menurunkan keputusan membatalkan tuntutan Yang Menuntut dengan kebebasan kepada Yang Menuntut untuk memohon menghidupkan semula dalam tempoh tiga bulan mulai daripada tarikh ini. "*

The Award being dated 3.5.2005, the application to reinstate had to be made on or before 2.8.2005.

9. It is the Firm's contention that the date of the application should be that date shown in the Applicant's notice of application which bears the seal of the Court and is signed by the Registrar. The date there is 30.8.2005. And this date the Firm avers, is out of time. On the other hand, it is the Applicant's position that the date of the application should be that date on which the Applicant's notice of application was filed in the Court. And this, as evidenced by the Court's stamp on the said notice of application, is 29.7.2005, a date which is within time. It is this date that is relevant submitted the Applicant, and not the date the said notice was signed and sealed by the Court's Registrar. That argument, I must admit made commonsense for any action by the Court's registry is outside the domain and control of the Applicant. Mr. S. Shanker went further to buttress his position by seeking support from the case of ***Teramaju Sdn. Bhd. v. Mohammad Khairul Anuar Chai Abdul Amin (2004) 3 ILR 646*** where the Industrial Court in a case on material facts on all fours with the instant application, held that the date of application for reinstatement of the case was the date the Court received the notice of application and not the date on which the application was signed and sealed by the Registrar for purpose of service to the opposing party.

10. In *stricto sensu,* I find the notice of application not to be important. The order in the Award merely requires the Applicant if she so desires, to apply to reinstate the Reference. The Award makes no mention on the

mode of application. So is the Industrial Court Rules, 1967 silent on the form that such an application should take. I would pause here to observe that the underlying purpose of the Act is speedy, social justice to both employers and employees. Section 30(5) of the Act which enables the Court to disregard technicalities and legal form is inconsonant with this objective. A mere communication by the workman stating the intention to apply to reinstate the case should suffice. And if this communication is within the time frame stipulated in the award, then the application is not out of time. Notification of the application to the employer and the filing of affidavits if required, are matters subsequent to the initial application to reinstate. In the circumstances I find that letter dated 29.7.2005 found in exhibit A2 from the Claimant's solicitors addressed to the Court, as being sufficient to be an application to reinstate the Reference. That letter having been received by the Court on 29.7.2005, makes the application within time.

Good Grounds

11. I now turn to consider the second issue before me, that is whether the Applicant showed good grounds to support her application to reinstate the Reference.

12. Here I need to step aside to dispose of one argument raised by Dato B. S. Sidhu which though not directly on point but which I found to be within the peripheral of the issue at hand. Relying on a decision by Vincent Ng J. in ***Hewlett Packard Sales (M) Sdn. Bhd. v. Active Team Mould Engineering Sdn. Bhd. & Ors (2003) 1 MLJ 247***, learned Counsel fashioned the argument that it is a prerequisite for the Applicant to show that she had a plausible or arguable claim in order to succeed. In the instant case it was submitted that the Applicant's claim was baseless, frivolous, vexatious, prejudicial, doomed to failure and an

abuse of the Court's process. Mr. S. Shanker took Dato B. S. Sidhu in advancing this argument, to refer to the substantive Reference and not to the instant application. I too saw no reason to think otherwise. This proposition I found, with respect, not to be in sync with current judicial thinking in the Industrial Court. I found myself treading with the utmost of care in dealing with this proposition for it sought to impose a hitherto unknown burden upon applicants seeking to reinstate cases in the Industrial Court. I begin by examining Mr. S. Shanker's response. I find his reference to the decision in ***Teramaju Sdn. Bhd. (supra)*** to be on point. There, learned Chairman Yeoh Wee Siam, faced with an argument, ostensibly of similar platform, held that *"Regarding the last ground that there is no merit in the claimant's case, the court agrees with learned counsel for the claimant that the merits of this case have to be decided during the hearing of the case."* As to what arguments were used there to persuade the learned Chairman, is not visible *ex facie* the award. But this in no way curtailed the ease with which I found myself being able to associate with the view expressed therein. And such a view I find not to be at odds with that expressed by Vincent Ng J. in the Hewlett Packard Sales (M) Sdn. Bhd. case for the reason that that case was not decided on the basis of an application made under the auspicious of the Act. Unlike ***Bank Pusat Kerjasama Bhd. (supra)*** a decision, made in the wake of the provisions of the Act, which laid particular emphasis on the Court's jurisdiction in reinstating cases that were earlier struck-off. The decision in Bank Pusat Kerjasama Bhd. case makes it incumbent upon an applicant to show good grounds to support an application for reinstatement. And nothing more. The need to show a plausible or arguable case in respect of the substantive reference was not made a prerequisite.

13. Continuing my analysis, I now move to the origin of the Reference in the Court. The Reference did not start in the Court at the behest of

the Applicant. It began by way of a referral by the Minister. And as to how the Minister decides upon a referral, I can do no better than to borrow the words of Gopal Sri Ram JCA speaking for the Supreme Court in ***Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd. (1997) 2 MLJ 685***, thus :

> *" Third, the referral level. When the Minister receives notification from the Director General that the dispute cannot be settled, he must decide whether to refer to the Industrial Court. He is not to refer all disputes to the Industrial Court. The question he must ask himself is whether, having regard to the facts and circumstances of the given case, the representations made by the workman is frivolous or vexatious. This is called the 'Hashim Yeop test' : see Minister of Labour, Malaysia v. Lie Seng Fatt (1990) 2 MLJ 9 and Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan and anor appeal (1996) 1 MLJ 481 at p.514. "*

From this, a conclusion that cases which are referred by the Minister to the Industrial Court are *prima facie* not frivolous nor vexatious is not far-fetched. All references made by the Minister to the Industrial Court start on a footing of being plausible or arguable. The need therefore does not arise for a workman who applies to the Court to reinstate a case to show that he had a plausible or arguable claim. In the upshot, I am forced to reject the challenge mounted by Dato B. S. Sidhu on this platform.

14. Having steered out of these choppy waters I now proceed to the correspondingly calmer proposition found in ***Hewlett Packard Sales (M) Sdn. Bhd. (supra)***. This formed the second platform on which Dato B. S. Sidhu assailed the application. And the charger upon which learned

Counsel mounted himself is that part of the decision where Vincent Ng J. held that an applicant for reinstatement should show that his conduct in relation to his absence in court which led to the striking off order, was not culpable. I find no hesitation in applying this principle to a similar type of application in the Industrial Court. In fact I find the need for the presence of non-culpability to be at the core of the good grounds postulated by Siti Normah bte Yaakob J. (as she then was) in ***Bank Pusat Kerjasama Bhd. (supra)***.

15. It is the Firm's submission that the Applicant had no good grounds to support her failure to attend the two mentions and to file her pleadings in the Industrial Court. With respect, I am not moved by this submission. The reason being that the evidence before me state otherwise. It is the testimony of the Applicant that she did not receive the Court's first notice on the filing of her pleadings and on the fixing of the first mention. She also did not receive the Court's second notice pertaining to the second mention. The Award states that the first notice was mailed to her by A.R. register and was returned by Pos Malaysia with the note "unclaimed". As for the second notice, it was put into the mailbox of the Applicant at her home address by the Court's notice server. It is the Applicant's evidence that being at work she was not at home. Her home was then occupied by her mother. The first notice by A.R. register and the second notice sent by the Court's notice server were not seen by her until at the time of her affidavit in support of her application. As for the Minister's letter on referring the Reference to the Court as well as the Award, she had received them both. The Award she said, she received by ordinary post. She was not questioned on the mode of dispatch of the Minister's referral letter which she confirms receipt of. I take judicial notice of the Court's copy of that letter which nowhere indicates that is was sent by registered mail to her.

16. That the Applicant had not seen the first notice is apparent from its return undelivered to the Industrial Court. As for the second notice, Mr. S. Shanker took the position that the Applicant should be given the benefit of the doubt and be believed when she said that she did not see it at the appropriate time. In support thereof he referred to ***Gwenkens Security Services Sdn. Bhd. v. Appadorai Doraisamy (2002) 2 ILR 578*** where learned Chairman Soo Ai Lin, in deciding on an application for reinstatement of a struck-off case, facing like despatch of a notice left in the claimant's mail box, decided that the application of section 30(5) of the Act enabled her to give the claimant the benefit of the doubt. I find no difficulty in accepting the position adopted by the learned Chairman. And as far as that part of Dato B. S. Sidhu's submission that the Applicant failed to check her letter-box, even if true, I do not find to be an act of culpability.

17. My conclusion is that the Applicant has good grounds to support her application to reinstate the Reference.

18. Before pronouncing the Court's order, there is one particular facet of the Award that I found shouting for attention but which unfortunately fell on deaf ears where parties were concerned. This is paragraph 7 of the Award containing the reasons why the order in the Award was made. I find it germane to repeat it in its original form. It goes like this :

> *" Memandangkan hal keadaan seperti tersebut di atas, Mahkamah bersetuju atas permohonan wakil Syarikat untuk membatalkan kes ini tetapi Mahkamah memberi peluang kepada Yang Menuntut untuk memohon menghidupkan kes ini dalam satu tempoh masa. "*

Ex-facie the Award, it was only after having considered the subject matter of those same complaints raised by the Firm in its effort to show that the Applicant had no good cause, that the Court had decided to give the Applicant an opportunity to rekindle into life the Reference. The Court showed no intention to permanently douse the Reference. It therefore stands to reason that the order in the Award, executed on these premises, should be liberally construed. The Award should not be made barren and rendered incapable to fructify its intention.

Order

19. For the reasons adumbrated, I order that the Reference be reinstated in the Court and heard up to resolution.

HANDED DOWN AND DATED THIS 17TH FEBRUARY 2006.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.