

KHOO BOO HAN
v.
LINDE MALAYSIA SDN BHD

Industrial Court, Kuala Lumpur
Rajendran Nayagam
Award No: 320 of 2015 [Case No: 23/4-488/13]
25 March 2015

***Dismissal:** Retrenchment — Redundancy — Claimant re-designated to a position in new division which was subsequently rendered redundant — Whether claimant's re-designation done with intention of retrenching him — Whether company entitled to discharge excess labour even by breaching Code of Conduct for Industrial Harmony — Whether company in breach of LIFO principle*

The claimant was a Marketing Manager of a certain division in the company. Subsequently, the company informed the claimant that he was re-designated as Marketing Manager of a new division of Industrial Gases in the marketing department. His subordinate took over as the Product Manager of another new division in the marketing department. The company then informed the claimant that the marketing department was being restructured to ensure better efficiency and optimisation of resources and there was a surplus of manpower in the marketing department. As such, his position as Marketing Manager of Industrial Gases was identified as redundant and his employment thus ceased. He was offered a compensation package as retrenchment benefits and the relevant sum as the payment of salary *in lieu* of notice, which he accepted. The claimant contended that he was being singled out for retrenchment when he was re-designated as Marketing Manager of Industrial Gases. The claimant also disputed that his position as Marketing Manager had become redundant. The claimant further claimed that the company was in breach of the Last in First Out ('LIFO') principle, when it selected him for retrenchment over his subordinate.

Held (dismissing the claimant's claim):

(1) The creation of the new division to be headed by the Product Manager was done because the company wanted the particular business to be managed separately. There was no evidence that it was done with the intention of retrenching the claimant. The company found that it did not have the need for a Marketing Manager, Industrial Gases in the marketing department and as such the claimant's position became redundant. So long as the restructuring of the marketing department was for genuine reasons of better management, the company was entitled to discharge excess labour and even the failure to comply with the Code of Conduct for Industrial Harmony was not fatal, as the Code does not have the force of law. (para 9)



(2) The LIFO principle is not immutable and may be departed from for valid reasons. However, in the instant case, the principle had no application as the claimant was the only one to be retrenched as the Marketing Manager whereas his subordinate was the Product Manager. This was because where for reasons of economy and any genuine interest of re-organisation, the services of a single employee of a category had to be dispensed with, there was no scope for the application of this principle.

Case(s) referred to:

Dynacraft Industries Sdn Bhd v. Kamaruddin Kana Mohd Sharif & Ors [2013] 1 MELR 219; [2012] 6 MLRA 564 (refd)

Equant Integration Services Sdn Bhd v. Wong Wai Hung & Anor [2012] 3 MELR 339; [2012] 5 MLRH 480 (refd)

William Jacks & Co (M) Sdn Bhd v. S Balasingam [1996] 1 MELR 312; [1996] 2 MLRA 603 (refd)

Legislation referred to:

Industrial Relations Act 1967, s 20(3)

Counsel:

For the claimant: Thisinayagam (Ravindranath Woodhull with him); M/s Nayagam & Partners

For the company: Vijayan Venugopal; M/s Shearn Delamore & Co

AWARD

Rajendran Nayagam:

[1] This is a ministerial reference under s 20(3) of the Industrial Relations Act 1967 made on 7 March 2013, for an award in respect of the dismissal of Khoo Boo Han (“the claimant”) by Linde Malaysia Sdn Bhd (“the company”).

The Facts

[2] The claimant commenced employment with the company (then known as Nissan-Industrial Oxygen Incorporated Berhad) as a Business Manager on 1 April 1999. He was confirmed on 1 June 1999. In 2002 the company was bought over by Malaysian Oxygen and the claimant continued working as a Channel Sales Manager. In 2003, he was transferred to MOX Gases Bhd with his years of service being recognised. In 2007, the Linde Group acquired the MOX group of companies. Linde Malaysia Sdn Bhd is a member of the Linde Group based in Munich, Germany. It is a world leading gases and engineering company. In other words, it is a multi-national company.

[3] The company in Malaysia had a Marketing Department, which had three divisions. The claimant was appointed as Marketing Manager of the division called Packaged Gases and Products on 1 January 2008. His main



portfolios were Industrial Gases and Hard Goods. The claimant had two employees assisting him in the division-one Mr Chang Lih Herng (Assistant Product Manager, Hard Goods) and one Ms Rajamany (Product Management Executive, Industrial Gases).

[4] Subsequently, in 2012 the company by letter dated 6 March 2012 informed the claimant that he was re-designated as Marketing Manager of the new division called Industrial Gases with retrospective from 1 February 2012. His subordinate Mr Chang Lih Herng took over the Hard Goods portfolio, which was established as another new division in the Marketing Department. The other subordinate Ms Rajamany had resigned in October 2011 and hence, the claimant was tasked to solely managed the Industrial Gases division in the Marketing Department.

[5] Then, on 3 July 2012, the company by letter informed the claimant that the Marketing Department was being restructured to ensure better efficiency and optimisation of resources and there was a surplus of manpower in the Marketing Department. As such, his position as Marketing Manager of Industrial Gases Division, was identified as redundant and as his employment ceased on 20 July 2012. He was offered a compensation package consisting of RM286,220 as retrenchment benefits and RM42,270 being payment of salary *in lieu* of notice, which was accepted by the claimant. In the retrenchment exercise, the company terminated a total of 70 employees.

[6] The claimant contended that he felt that he was being singled out for retrenchment when he was re-designated as Marketing Manager in 2012 and further that the company was in breach of the LIFO principle, when they selected him for retrenchment over his subordinate Mr Chang Lih Herng.

Evaluation

[7] This is a case of retrenchment involving a multi-national company. It is wellsettled that an employer is entitled to organise his business in the manner he considers best. So long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. (See *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1996] 1 MELR 312; [1996] 2 MLRA 603). In this regard, the company's witness [COW1], the Head of Human Resources stated that although the company was financially profitable at the material time, it had decided to undergo a restructuring exercise to improve productivity and reduce cost due to intense market competition. The fact that the company was profitable did not prevent it from further reorganising its business and operations and retrenching its surplus workforce. The company had terminated a total of 70 employees. They consisted of 35 retrenched employees, 23 employees who were given voluntary separation scheme and 12 contract employees. In any event, the claimant concedes that he is not questioning the company's right to restructure.



[8] However, the claimant disputes that his position as Marketing Manager had become redundant. He said that on 1 January 2008, he was appointed as the Marketing Manager of the division called Packaged Gases and Speciality Products (PGP). This consisted of two main portfolios namely; (i) Industrial Gases and (ii) Hard Goods. He reported to Ms Ng Lee Kuan, the Head of Marketing Department. He was assisted by one Ms Rajamany, a Product Executive in the Industrial Gases sector from 2008 to 2011 and Mr Chang Lih Heng, an Assistant Product Manager in the Hard Goods sector from 1 February 2010. In 2011, when Ms Rajamany left the company, he managed the Industrial Gases sector on his own. He said that on 1 February 2012, when the company restructured the Marketing Department, they split his Division into two Divisions. He was now re-designated as Marketing Manager, Industrial Gases in the Marketing Department and the Hard Goods portfolio was taken away from him and given to his subordinate, Mr Chang Lih Heng, who became the Product Manager, Hard Goods, who now reported directly to Head of Marketing. This is the main complaint of the claimant. He said that prior to Mr Chang Lih Heng joining the Marketing Department, he was with the company's Bulk Gas Distribution Department, which was essentially logistics and distribution planning. He said that Mr Chang Lih Heng did not have any experience in marketing or in interacting with customers. The claimant said that he was instrumental in teaching and guiding him on his role and responsibilities in marketing. For these reasons, the claimant felt that the company should have retrenched Mr Chang Lih Heng, who was his junior, who had only two years experience in marketing compared to his 13.5 years in the company.

[9] As regards the issue of creating the new division called Hard Goods in 2012 and having it headed by Mr Chang Lih Heng, as Product Manager, COW1 said that it was done because the company wanted the business of Hard Goods and Industrial Gases to be managed separately. There is no evidence whatsoever that it was done with the intention of retrenching the claimant. The company said that they selected Mr Chang Lih Heng because he possessed an engineering degree and MBA whereas the claimant had a Graduate Diploma in Marketing. They needed someone who had both technical knowledge and operation knowledge to manage Hard Goods. COW1 added that Mr Chang Lih Heng was taken in as he could promote sales and resolve customer's problems. COW1 said that eventually, the company found that they did not have the need for a Marketing Manager, Industrial Gases in the Marketing Department and as such the claimant's position became redundant. The position no longer exist in the company today. As stated above, so long as the restructuring of the Marketing Department in 2012 was for genuine reasons of better management, the company was entitled to discharge excess labour and even the failure to comply with the Code of Conduct for Industrial Harmony is not fatal, as the code does not have the force of law. (see *Equant Integration Services Sdn Bhd v. Wong Wai Hung & Anor* [2012] 3 MELR 339; [2012] 5 MLRH 480).



[10] As regards the LIFO principle, it is trite law that it is not immutable and for valid reasons may be departed from. However, in the instant case, the principle has no application as the claimant was only one to be retrenched as Marketing Manager whereas Mr Chang Lih Herng was the Product Manager. This is because for reasons of economy and any genuine interest of reorganisation, the services of a single employee of a category have to be dispensed with, there is no scope for the application of this principle. (See *Dymacraft Industries Sdn Bhd v. Kamaruddin Kana Mohd Sharif & Ors* [2013] 1 MELR 219; [2012] 6 MLRA 564).

Finding

[11] In conclusion, for the reasons given, is the finding of this court that the position of the claimant had become redundant and accordingly the claimant was retrenched. As such, his dismissal was for just cause or excuse.

Order

[12] Accordingly, the claim is hereby dismissed.

