ABDUL AZIZ ISMAIL & ORS
v.
ROYAL SELANGOR CLUB

Industrial Court, Kuala Lumpur
Eddie Yeo Soon Chye
Award No: 327 of 2015 [Case No: 13(25)(22)(25)/4-1255/2011]
26 March 2015

Dismissal: *Voluntary separation scheme — Claimants claimed club had dismissed them via voluntary separation scheme which was allegedly forced upon them — Whether there was mutual termination of employment by parties — Whether claimants had voluntarily agreed to said mutual termination*

The claimants were holding the posts of Security Guards in the club. The claimants alleged that the club had introduced a voluntary separation scheme ('VSS') on the pretext of improvement on efficiency and streamlining. The claimants claim that the club then forced the VSS upon them. The claimants further contended that they were not redundant and the VSS was effected in breach of the Code of Conduct for industrial harmony. The claimants claimed that they were forced to accept the VSS and that the club's action was unfair. The club pleaded that the offer of VSS was to circumvent a retrenchment exercise arising from the consequential redundancy of the security personnel following the club's decision to outsource its security operations. The club submitted that there was mutual termination of employment through the VSS which had been acknowledged by the claimants by their own signatures and thus there was no dismissal as alleged by the claimants. The club thus argued that the claimants had, pursuant to the VSS, mutually agreed to terminate the employment contracts.

Held (dismissing the claimants' claims):

(1) Based on the totality of the evidence adduced, it was held that the claimants had voluntarily applied to participate in the VSS initiated by the club. When the club accepted the VSS applications, it resulted in the cessation of the claimants' employment. (para 24)

(2) The club informed the claimants that their application upon the terms and conditions of the VSS had been accepted by the club together with the payments due to them. The acknowledgement of the claimants by their own signatures was proof of receipts. In the circumstances, there was in law a mutual termination of employment in accordance with the terms and conditions of the VSS. Consequently, there were no dismissals of the claimants by the club. (para 25)

(3) The claimants had applied to participate in the VSS by completing the particulars including the dates in the VSS application forms which were signed

and submitted to the club. The application form for the VSS stated that the respective claimants had applied voluntarily without being forced or persuaded by any parties, to participate in the VSS. The claimants also declared that they understood and agreed with the terms and conditions contained in the document unconditionally if their applications were accepted by the club. Thus, the issue of whether the claimants' dismissal were with just cause or excuse did not arise. (paras 26 & 30)

Case(s) referred to:

Birch & Anor v. Liverpool University [1985] ICR 470 (refd)

CB Marketing Sdn Bhd & Anor v. Tan Tee Ming & Ors [2002] 3 MELR 375 (refd)

Kesatuan Pekerja-Pekerja Perusahaan Simen (SM) v. Lafarge Cement Berhad [2013] 3 MELR 654 (refd)

Nik Adnan Nik Mohd Salleh v. Propel-Johnson Controls (M) Sdn Bhd [2007] 5 MELR 855 (refd)

Tanjung Aru Hotel Sdn Bhd v. Junit Blasius Mojugah [1994] 3 MELR 315 (refd)

Telekom Malaysia Bhd v. Pg Morshide Pg Omar [1998] 2 MELR 303 (refd)

Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor [1998] 4 MLRH 774 (refd)

Zainon Ahmad & Ors v. Padiberas Nasional Bhd [2012] 3 MELR 223; [2012] 4 MLRA 608 (refd)

Legislation referred to:

Industrial Relations Act 1967, ss 20(3), 30(5)

Other(s) referred to:

Ashgar Ali Ali Mohamed, *Voluntary Retrenchment: Voluntary Or Manual Separation Scheme* [2015] 1 ILR iii

Counsel:

For the claimants: Peter Kandiah; Malaysian Trades Union Congress (MTUC)

For the club: Jacinta Johnson; M/s Zul Rafique & Partners

AWARD

Eddie Yeo Soon Chye:

Facts

Preface

[1] This is a reference by the Honourable Minister of Human Resources under s 20(3) of the Industrial Relations Act 1967 on 1 August 2011 arising out of the dismissal of Abdul Aziz Ismail & Ors (the "claimants") on 15 April 2008 by Royal Selangor Club (the "club").

[2] This case was heard before former Chairman Jalaldin Hussain of another division (court 25) from 21 April 2014 (Kuala Lumpur), 12 May 2014 (Taiping) and 25 June 2014 (Kuala Lumpur). The former Chairman has retired from service on 12 August 2014. When the case was called for mention on 11 November 2014, both parties consented to the Award to be handed down by another Chairman. The Honourable President of the Industrial Court directed that this case to be transferred to this division (court 13) on 23 February 2015 for the handing down of the Award. The file was received on 17 March 2015. The club's written submissions and bundle of authorities were filed by Messrs Zul Rafique & Partners on 14 July 2014 and submissions in reply and authorities on 24 December 2014. The claimants' representative, Malaysian Trades Union Congress filed the written submissions on 11 December 2014.

[3] The club in their statement in reply pleads that the dispute is over the claimants' voluntary separation scheme (VSS) with effect from 15 April 2008 and further pleads that there was no dismissals in respect of the claimants' employment with the club. The club denies that it had dismissed the claimants without just cause or excuse. Hence in this case the claimants commenced their case against the club. The claimants are holding the posts of Security Guards and the relevant particulars as reflected in "Lampiran A" annexed to the reference are as follows:

No	Name (Claimants)	Salary (RM)	Commencement date	Length of service
1	Abdul Aziz Ismail (CLW6)	1,811.00	1 June 1992	16 years
2	Othman B Majid (CLW1)	1,392.00	8 June 1998	10 years
3	Mokhtar B Mansor (CLW2)	1,372.00	19 November 1997	11 years
4	Mohd Zani @ Mohd Sofi B Harun (CLW3)	1,456.00	27 January 1998	10 years
5	Shaik Mahamud B Abdul Salam (CLW5)	1,240.00	16 January 1997	11 years
6	Maryani Bt Ahmad (CLW4)	1,250.00	11 March 1995	13 years

Facts Of The Case

[4] The 1st claimant (Abdul Aziz Ismail) was promoted as a Security Supervisor effective 18 May 1999. His job functions and responsibilities were to ensure the safety and security of the club members and the club's property. He was also responsible for supervising and coordinating the activities and personnel based on assigned areas.

[5] The 2nd claimant (Othman Bin Majid) was promoted as Assistant Security Supervisor effective 18 May 1999. The 2nd claimant's job functions and responsibilities were to ensure the safety and security of the club members and club's property and he is required to take charge during the 1st claimant's absence.

[6] The 3rd claimant (Mokhtar Bin Mansor) was promoted as Assistant Security Supervisor effective 18 May 1999. The 3rd claimant's job functions and responsibilities were to ensure the safety and security of the club members and club's property and he is required to take charge during the 1st claimant's absence.

[7] The 4th claimant (Mohd Zani @ Mohd Sofi Bin Harun), 5th claimant (Shaik Mahamud Bin Abdul Salam) and the 6th claimant (Maryani Binti Ahmad) held the post of Security Guards. Their job functions and responsibilities were to guard, patrol or monitor the club's premises to prevent theft and violence as well as to protect the safety of the club's members and property.

[8] The club by Application Form For Voluntary Separation Scheme (VSS) in COB1, p 1 offered to their staff to apply voluntary without being forced or persuaded by any parties to participate in the VSS. The Invitation To Apply For The VSS (COB1, p 2) is open to all permanent and confirmed employees of the club and the application for participation of the VSS is effective 4 February 2008 until 11 February 2008.

[9] The Application Form For The VSS and the Invitation To Apply For The VSS for the claimants are exhibited in COB1, pp 5-8 (1st claimant), COB1, pp 9-12 (2nd claimant), COB1, pp 13-16 (3rd claimant), COB1, pp 17-20 (4th claimant), COB1, pp 21-24 (5th claimant) and COB1, pp 25-28 (6th claimant).

[10] The club issued the claimants a letter "Voluntary Separation Scheme" dated 4 March 2008 (COB1, pp 29-40) respectively signed by SA Nathan, General Manager and the relevant extract of the said letter is reproduced as follows:

> "We refer to your application to participate in the Voluntary Separation Scheme. The club is pleased to inform you that your application, upon the terms and conditions of the Voluntary Separation Scheme, has been accepted by the club. All payments due to you are set out in the attached Appendix to this letter and will be released as soon as the relevant clearance has been obtained from the Department of Inland Revenue. In light of the above, your last day of employment with the club would be 15 April 2008."

[11] The Appendix to the said VSS letter to the respective claimants detailing the payments due to them stating the amount payable under the VSS with the payment for the unused annual leave and proportion of the annual bonus 2008 are reproduced as follows:

1st claimant (COB1, p 30)

a) Amount due under the Voluntary Separation Scheme (VSS) - RM31,634.55

b) Balance of unused annual leave (25 days) at 1 March 2008 - RM 1,741.35

c) Proportion of annual bonus 2008 till 15 April 2008 - RM 678.56

TOTAL GROSS AMOUNT - RM34,054.46

2nd claimant (COB1, p 32)

a) Amount due under the Voluntary Separation Scheme (VSS) - RM17,863.08

b) Balance of unused annual leave (17 days) at 1 March 2008 - RM 1,080.15

c) Proportion of annual bonus 2008 till 15 April 2008 - RM 609.00

TOTAL GROSS AMOUNT - RM19,552.23

3rd claimant (COB1, p 34)

a) Amount due under the Voluntary Separation Scheme (VSS) - RM18,935.22

b) Balance of unused annual leave (21 days) at 1 March 2008 - RM 1,334.31

c) Proportion of annual bonus 2008 till 15 April 2008 - RM 609.00

TOTAL GROSS AMOUNT - RM20,878.53

4th claimant (COB1, p 36)

a) Amount due under the Voluntary Separation Scheme (VSS) - RM16,410.15

b) Balance of unused annual leave (26 days) at1 March 2008 - RM 1,462.58

c) Proportion of annual bonus 2008 till 15 April 2008 - RM 526.13

TOTAL GROSS AMOUNT - RM18,398.86

5th claimant (COB1, p 38)

a) Amount due under the Voluntary Separation Scheme (VSS) - RM18,568.81

b) Balance of unused annual leave (20 days) at 1 March 2008 - RM 1,154.24

c) Proportion of annual bonus 2008 till 15 April 200 - RM 542.72

TOTAL GROSS AMOUNT - RM20,265.77

6th claimant (COB1, p 40)

a) Amount due under the Voluntary Separation Scheme (VSS) - RM20,718.38

b) Balance of unused annual leave (21 days) 1 March 2008 - RM 1,259.34

c) Proportion of annual bonus 2008 till 15 April 2008 - RM 568.39

TOTAL GROSS AMOUNT - RM22,546.11

[12] The claimants' pleaded case can be gleaned from their statement of case stating that the club had introduced the VSS on the pretext of improvement on efficiency and streamlining and the club then forced the VSS upon them.

The claimants further contended that they were not redundant and the VSS was effected in breach of the Code of Conduct for Industrial Harmony. The club pleaded that the offer of VSS was to circumvent a retrenchment exercise arising from the consequential redundancy of the security personnel following the club's decision to outsource its security operations.

The Club's Case And Submissions

[13] The club called Salina Binti Jaafar (COW1), Assistant Manager – Human Resources to testify. At the material time in 2008, COW1 was the then Human Resource Senior Executive of the Club and was required to report to the General Manager (SA Nathan). COW1 assisted the club in the VSS exercise that was undertaken in the year 2008. The club's nature of business is a social club exclusively for its members. The claimants were employees in the club until their services with the club came to an end following the club's acceptance of their offers for the VSS.

[14] COW1 outlined the reason why the club issued the invitation to all the employees in the security services. Sometime in 2007, in order to achieve cost effectiveness and manage its resources, the club made a decision to outsource its security operations. The decision was made after a review of the club's operations and the costs involved in maintaining its security workforce. To avoid a retrenchment exercise arising from the consequential redundancy of the security personnel, the club decided to initiate a VSS exercise in 2008. All employees in the security services of the club were invited to apply for the VSS.

[15] The club's counsel submitted the claimants were not dismissed but there was mutual termination of employment through a VSS and thus the question of whether or not there was a dismissal does not arise (written submissions, para 8). There was no dismissal as alleged by the claimants. On the contrary the claimants have pursuant to the VSS mutually agreed to terminate the employment contracts (written submissions, para 31). The claimants have failed to discharge the burden of proof that their application to participate in the VSS and their agreement to the VSS Terms and Conditions via the VSS Application Form was involuntary (submissions in reply, para 2.3). The issue of whether the dismissals of the claimants were with just cause or excuse does not arise at all as this is a case pursuant to a VSS that was mutually agreed between the club and the claimants (submissions in reply, para 3.1).

The Claimants' Case And Submissions

[16] All the six claimants testified in their examination-in-chief in a similar fashion where they state that they were forced by the club to accept the VSS and that the club's action was unfair. The claimants disagree with the club's action as they were forced into signing the VSS and the claimants were threatened into signing the same, failing which the club would dismiss them without any compensation.

[17] The claimants' representative submitted that the dismissal of the six claimants was without just cause or excuse (written submissions, para 14). The club had forced and/or abused the VSS against the six claimants. The VSS and the employment of foreign outsourced workers are absolutely an abuse of the management's prerogative (written submissions, para 24). The claimants were not given a pre-warning of the VSS and the retrenchment as required under arts 20 and 21 of the Code of Conduct for Industrial Harmony (written submissions, para 33).

The Law On VSS

[18] The Federal Court in the case of *Zainon Ahmad & Ors v. Padiberas Nasional Bhd* [2012] 3 MELR 223; [2012] 4 MLRA 608 decided as follows:

> "[14] The main issue in this appeal is whether, the rights that arise upon the termination of an employment contract are extinguished pursuant to a termination through VSS despite the absence of an express provision to that effect. In the case of *AK Bindal & Anor v. Union of India & Anor* [2003] 3 LRI 837, the Supreme Court of India had succinctly laid down the governing principles for VSS thus:
>
> > The Voluntary Retirement Scheme (VRS) which is sometimes called Voluntary Separation Scheme (VSS) is introduced by companies and industrial establishments in order to reduce the surplus staff and to bring in financial efficiency.
> >
> > The whole idea of implementing VRS is to save costs and improve our productivity. The main purpose of paying this amount is to bring about a complete cessation of the jural relationship between the employer and the employee. After the amount is paid and the employee ceases to be under the employment of the company or the undertaking, he leaves with all his rights and there is no question of him again agitating for any kind of his past rights, with his erstwhile employer including making any claim with regard to enhancement of pay scale for an earlier period.
> >
> > If the employee is still permitted to raise a grievance regarding enhancement of pay scale from a retrospective date, even after he had opted for Voluntary Retirement Scheme and had accepted the amount paid to him, the whole purpose of introducing the scheme would be totally frustrated."
>
> "[18] It is our view that under VSS the employee have the option to accept the said scheme or continue to work as before. Therefore, once the said option has been exercised by the employees, the question of it being unfair does not arise. To us an employee who on his own will, accepts the benefits of the VSS, resigns, signs a full and final settlement and walks away cannot turn around and ask for any other benefits."

[19] The author Ashgar Ali Ali Mohamed in his article "*Voluntary Retrenchment: Voluntary Or Manual Separation Scheme*" [2015] 1 ILR iii outlined the effect of a Voluntary Separation Scheme as follows:

> "When an employee makes an application for VSS, he is considered as offering his early retirement to the company, subject to the company's acceptance of it. When the company accepts the application for VSS, the contract of employment is said to be terminated by mutual consent and it is not considered a dismissal."

Evaluation And Findings

[20] The issue to be determined is whether there was a dismissal against the respective claimants by the club. At the outset of the matter before the court, it was the club's pleaded case that the claimants had voluntarily applied for the VSS initiated by the club and the club accepted the claimants' application for the VSS.

[21] Where the fact of dismissal is in dispute, it is for the claimants to establish that they were dismissed by the club. The High Court in the case of *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor* [1998] 4 MLRH 774 at p 776 decided as follows:

> "However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not at all arise (see *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor* [1998] 4 MLRH 774)."

[22] The Industrial Court in the case of *Nik Adnan Nik Mohd Salleh v. Propel-Johnson Controls (M) Sdn Bhd* [2007] 5 MELR 855 decided at p 871 that if there is a mutual termination of employment through a voluntary separation scheme and the claimant accepts the company's offer there is neither a resignation by the claimant nor a dismissal by the company. What is then most important is that the claimant had accepted the voluntary separation scheme voluntarily. The Industrial Court Chairman was in full agreement with the decision in *Tanjung Aru Hotel Sdn Bhd v. Junit Blasius Mojugah* [1994] 3 MELR 315; *Telekom Malaysia Bhd v. Pg Morshide Pg Omar* [1998] 2 MELR 303 and *CB Marketing Sdn Bhd & Anor v. Tan Tee Ming & Ors* [2002] 3 MELR 375.

[23] The Industrial Court Chairman in the case of *Telekom Malaysia* (*supra*) referred to the case of *Birch & Anor v. Liverpool University* [1985] ICR 470 where the Court of Appeal upheld the Employment Appeal Tribunal (EAT) decision that the contract had been terminated by mutual consent and there had been no dismissal. The EAT observed that "in every case it will be necessary to determine what it is that has the effect as a matter of law of terminating the particular contract" and proceeded to find that in the facts of the case the termination of the two employees was effected by mutual agreement and not dismissal.

[24] Based on the totality of the evidence adduced by the claimants and COW1, it is the finding of this court that all the six claimants had voluntarily

applied to participate in the VSS initiated by the club and when the club merely accepted the said VSS applications it resulted without a doubt the cessation of the claimants' employment.

Was There A Mutual Termination Of Employment By The Parties To The Dispute?

[25] The issue that arose before the court is whether there was a mutual termination of employment by the parties to this dispute and whether the claimants had voluntarily agreed to the said mutual termination. The club was pleased to inform the claimants in the letters dated 4 March 2008 stating that their application upon the terms and conditions of the VSS has been accepted by the club together with the payments due to them. The club's letter also states that the last day of employment with the club would be 15 April 2008. The acknowledgement of all the claimants by their own signatures are proof of receipts. In the circumstances the court holds that pursuant to the club's acceptance of the claimants' application for the VSS, there is in law a mutual termination of employment in accordance with the Terms and Conditions of the VSS. Consequently, there were no dismissals of the claimants by the club.

Whether The Claimants Had Voluntarily Agreed To The Said Mutual Termination?

[26] The undisputed facts are clear in this case where the claimants had applied to participate in the VSS by completing the particulars including the dates in the VSS Application Forms which were signed and submitted to the club. The Application Form for the Voluntary Separation Scheme clearly states that the respective claimants thereby apply voluntarily without being forced or persuaded by any parties, to participate in the Voluntary Separation Scheme. The claimants also declared that they understand and agree with the Terms and Conditions contained in the document unconditionally if their applications are accepted by the Royal Selangor Club. The preamble to the invitation to apply for the VSS clearly states that the VSS is voluntary in nature and therefore all applications must be made with the employees' own free will. How can the claimants allege that they were forced into signing the VSS when the employees who wish to apply for the VSS are required to complete the attached Application Form in their own handwriting? (see Terms and Conditions, para 9). The Application Forms for the VSS clearly bear the signatures of the respective claimants and they have signed and date them without stating any protest or qualifications whatsoever. The VSS payments, balance of unused annual leave and proportion of annual bonus of the respective claimants were received without any complaint or reservation. There were no formal complaints to the club between the date the claimants submitted their VSS Application Forms (5 February 2008) and their last date of employment on 15 April 2008. In the circumstances, the court finds that the claimants had by accepting the terms and conditions of the VSS, offered themselves to accept the VSS and the payments voluntarily. On the contrary, there was no evidence that the claimants were forced into signing and accepting the VSS.

Other Issues

[27] The claimants submit that employing foreign contract worker is a blatant abuse of the club's management prerogative. COW1 explained that sometime in 2007 in order to achieve cost effectiveness and manage its resources, the club made a decision to outsource its security operations. There was no evidence that the club had abused its management prerogative in engaging contractors in place of permanent employees.

[28] The issue in respect of the company's (Lafarge) alleged continued abuse of the Voluntary Separation Scheme (VSS) and its employment of contract workers to replace permanent workers was deliberated in the case of *Kesatuan Pekerja-Pekerja Perusahaan Simen (SM) v. Lafarge Cement Berhad* [2013] 3 MELR 654 at p 666 where the Industrial Court decided as follows:

> "[34] … there is not an iota of evidence that the company had abused its prerogative in engaging contract workers for specific reasons of efficiency and cost reduction. In the circumstances, the court is of the view that there is no merit in the union's claim that it had abused its prerogative to engage contractors in place of permanent employees. The engagement of contract workers by the company was based on business decisions, cost reduction and operational efficiency factors."

[29] The claimants submit that they were not given a pre-warning of the VSS. COW1 categorically explained in no uncertain terms that during the briefing with the employees on 29 January 2008 in the security section, the General Manager of the club, Mr SA Nathan together with Sarbjit Singh Sambhi and COW1 informed the employees of the club's intention to initiate a VSS exercise as the club intended to outsource its security to save operational costs. At the briefing, the General Manager clearly explained that the VSS was entirely a voluntary exercise.

Conclusion

[30] Having evaluated the evidence of the claimants and club and having considered the written submissions of both parties, the court finds that there was no dismissal as alleged by the claimants. The claimants and the club have pursuant to the VSS mutually agreed to terminate the employments. Consequently the issue of whether the dismissal was with just cause or excuse does not arise.

[31] In conclusion, taking into consideration the totality of the evidence adduced by the claimant and the respondent and bearing in mind s 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, this court finds that the claimants failed to prove that their application to participate in the VSS and their agreement to the VSS Terms and Conditions via the VSS Application Form were involuntary.

[32] The claimants' case is hereby dismissed.