

*a***PANTAS CERAH SDN. BHD.****v.****LAU BOON SENG***b*

INDUSTRIAL COURT, KUALA LUMPUR
TAN KIM SIONG
AWARD NO. 596 OF 1999 [CASE NO: 4/4-169/97]
3 NOVEMBER 1999

c

DISMISSAL: *Breach of company policy - Dishonesty - Illegal transactions - Conflict of interest - Dealing with company's clients for personal interests - Whether allegations substantiated*

d

The company dismissed the claimant, arguing that he had intentionally pursued transactions which were illegal in nature. They also alleged that the claimant had traded with their customers to facilitate gaining profits for himself. He was subsequently dismissed. The claimant alleged that he had pursued the transactions with his colleagues' knowledge. And that he had been set up by them.

*e***Held:**

[1] When an employer employs an employee, it is implied the employee will faithfully, with loyalty and honesty, further the interests of the employer. There is a fiduciary relationship between the employer and the employee. An employee under the payroll of the employer should not do any act which causes detriment to the interests of the employer.

f

[2] There was sufficient evidence to prove that the claimant knew what he was doing. There was no possibility that he could not have known the nature of his acts or that he was reckless in pursuing them.

g

[3] The claimant had committed wrongdoings inconsistent with employer-employee relationship by engaging in activities which was in conflict of interest with his duties and loyalty to his employer.

h

[4] The claimant, being in the position of a chief executive, must be a man of integrity, absolutely trustworthy and confidence. However, he had betrayed the trust reposed in him.

i

[5] It was reasonable for the company to consider that it would be unsafe to continue his employment after what he had done to damage its interests.

[Just dismissal.]

Legislation referred to:

Industrial Relations Act 1967, s. 20(3)

For the claimant - Alex Charles; M/s Nur Ashikin Alex & Rakan-Rakan

For the company - Steven Wong; M/s Ariffin & Partners

AWARD

The claimant was a director of the company together with three other shareholders. The claimant was also employed as a working director with a minimum basic salary of RM4,500 per month, plus a fully maintained company car. In the agreement duly executed by all the shareholders the claimant was bound to work for the company for a period of at least five years from the date of commencement of the agreement on 1 March 1994. The claimant was dismissed by the company with effect from 11 August 1995 for a series of transactions for which the company contends is a breach of contract by the claimant as an employee of the company.

In the statement of case the claimant alleges the company has wrongfully and in repudiatory breach of the contract of employment dismissed him as an employee.

In the statement in reply the company denies that the claimant was holding the remunerative post of a sales manager and was, at all times the executive director of the company. The company denies there was any agreement of the claimant's employment in the company.

The company "avers that in the course of his attachment and involvement cum employment with the company" the claimant had committed misconduct by forming his own company detrimental to the company's business.

The company's case against the claimant is mainly from the evidence of COW4, a director of the company whose evidence has to be examined in detail to better understand the dispute. His evidence is as follows:

The initial capital of the company was RM250,000 and the claimant only contributed RM5,000 towards the initial capital outlay, with three other major financial shareholders, Chong Kok Yoong, Chong Kok Sang and Tai Yew Kian. The other directors were not to be involved in the day to day operations of the company although I was to drop by the office once a month on my monthly visit to Kuala Lumpur for my other business activities. This was so because my brother was permanently based in Ipoh and Tai Yew Kian was too busy with his work as a consultant engineer.

However, due to the financial difficulties encountered by the company, another investor, Cheam Swee Aik was invited to be a shareholder cum director to increase the working capital of the company.

a The then existing shareholders cum director then held discussion about the new investor Cheam Swee Aik joining the company and each and every one of them including the claimant and myself consented to the proposed revised shareholdings.

b Adjustments was then made to the shareholdings to accommodate Cheam Swee Aik.

However, no revision were made to the original working contract as all parties concerned then trusted each other to abide by the decision.

c The company commenced business in early March 1994 so when the time came for the financial year accounts to be prepared sometime in June/July 1995, the board of directors decided to appoint Messrs P.G. Lim & Associates, who were public accountants to carry out the external audit.

COW4 continued:

d As a result of which, sometime in late July/early August 1995, a day which happened to be a public holiday, a company's employee James Loke Kar Choon, COW3 and wife contacted me in the evening in Ipoh and informed me that he was in the vicinity to visit his brother who was supposed to be working around the area.

e I was then running my family business, which was a petrol kiosk, Ipoh Service Station Sdn Bhd at 202, Jalan Gopeng, 31350 Ipoh, Perak Darul-Ridzwan.

I then told him to drop by at the petrol kiosk and I would buy him dinner. I also contacted Cheam Swee Aik and since he was also in Ipoh, I invited him to join us for dinner.

f After dinner, Cheam Swee Aik left us and James Loke Kar Choon and I then adjourned back to the petrol kiosk since his car was parked there.

Then, I sensed that James Loke Kar Choon was rather uneasy and he was fidgeting all the time. So I asked him if there was anything I can do for him.

g He then told me that he had something to disclose. We then decided to adjourn to my house in Ipoh.

At my house, James Loke Kar Choon then disclosed the illegal transaction that was being conducted and which is now found in the Statutory Declaration declared by him on 6 October 1995.

h I was totally flabbergasted when I heard James Loke Kar Choon relate the whole matter to me.

i I then asked him where was the claimant at that time. He said that he was in Indonesia then with his wife, Shirley Wong who was then liaising with supplier for a consignment of goods for a Company called Assured Profit Sdn. Bhd.

After disclosing the details of the dealings of Assured Profit Sdn. Bhd. and the three phantom companies mentioned in his statutory declaration which were Kim Wah Trading; Luggage Express Sdn. Bhd.; and Mun Loong Enterprise, he then left my house at approximately 10.00 p.m. for Kuala Lumpur. *a*

On the very next day, I had a discussion with my brother and Cheam Swee Aik as to the next course of action. *b*

During that time, we were in constant contact with James Loke Kar Choon and preparations were then made to go up the company's office to go through all the evidence of irregularities in the account over that weekend.

It was then that my brother and Cheam Swee Aik were to come down to Kuala Lumpur to the company's office during that weekend and whilst James Loke Kar Choon came from Seremban to identify all the evidence of the irregularities in the company's office and since James Loke Kar Choon had a set of office keys, there was no problem in getting access to the office. *c*

My brother, Cheam Swee Aik and James Loke Kar Choon went through the documentary evidence and photostated all the important documents. *d*

After a thorough investigation, on 10 August 1995, we went the Bukit Aman Police Headquarters to seek their advice of the situation. After discussing the facts with the police officer in charge, we were then advised to lodge a police report with them and to enable them to conduct a thorough investigation. *e*

On 11 August 1995, my brother called me in the morning to inform me that the suitcases which contained various documentation, files and stationary belonging to Assured Profit Bhd. were left at the company's office by the claimant.

Upon going through the evidence, we found that: *f*

a) there was documented proof to show that the Claimant had represented Assured Profit Sdn. Bhd. to open a parallel account with one of the Company's customer, which is CARREFOUR:

i) at page 172 (Cooperation Document No. 001653); page 173 (Cooperation Document No. 001652); and page 174 (Cooperation Document No. 001654) of the company's bundle of documents COB it can be seen that the claimant had represented the company in the said transactions and Miss Pauline Rajoo represented CARREFOUR; *g*

ii) at page 178 (Cooperation Document No. 001651); page 179 (Cooperation Document No. 001647); and page 179 (Cooperation Document No. 001647) of COB, it can be seen that the Claimant had represented Assured Profit Sdn. Bhd. in the transactions and Miss Pauline Rajoo represented CARREFOUR; *h*

i

- a* iii) at page 175 of COB which is a facsimile (dated 20-6-1995) issued by CARREFOUR to Assured Profit Sdn. Bhd. *via* a facsimile line which as connected to the company's quarters (03-6333701), it was attentioned to the claimant and it referred to invoice no. 0032 (dated 16-6-1995) of Assured Profit Sdn. Bhd., which is found at page 51 of COB;
- b* iv) at page 176 of COB which is a facsimile (dated 2-6-1995) issued by CARREFOUR to Assured Profit Sdn. Bhd. *via* a facsimile line which was in fact the company's line (03-6321484), it was attentioned to the claimant and it referred to invoice no. 0014 (dated 20-5-1995) of Assured Profit Sdn. Bhd., which is found at page 33 of COB;
- c* v) at page 177 of COB which is a facsimile (dated July 1995) issued by CARREFOUR to Assured Profit Sdn. Bhd. *via* a facsimile line which was in fact the Company's line (03-6321484), it was attentioned to the claimant and it referred to invoice no. 0023 (dated 2-6-1995) of Assured Profit Sdn. Bhd., which is found at page 42 of COB.
- d* b) there was documented proof to show that the claimant had represented Assured Profit Sdn. Bhd. as a director to mislead one of the company's customers, which was Jaya Jusco Stores Sdn. Bhd. in changing the bank accounts from that of the company to Assured Profit Sdn. Bhd.:
- e* i) at page 193 of COB, it can be seen that *via* letter dated 10-4-1995 to Jaya Jusco which was issued under the company's letterhead and duly signed by the claimant as a director of the company, it was stated that:
- f* With reference to the above matter, we wish to inform your goodselves that with effect from 2 May 1995, all transactions with Jaya Jusco Stores including cheque payments shall be under ASSURED PROFIT SDN. BHD. The bank account shall be Oriental Bank Ipoh Account No. 1910046309.
- g* ii) at page 192 of COB, it can be seen that *via* a letter dated 7-6-1995 to Oriental Bank Berhad which was issued by Assured Profit Sdn. Bhd. and duly signed by the claimant's wife, Wong Chian Shy, as a director of Assured Profit Sdn. Bhd., it can be seen that Assured Profit's account number with the said bank is indeed 1910046309;
- h* iii) at page 191 of COB, it can be seen that *via* a letter dated 14-7-1995 to Jaya Jusco which was issued by Assured Profit Sdn. Bhd. and duly signed by the claimant as a director of Assured Profit Sdn. Bhd., it was duly stated that:
- i* With reference to the above matter and our teleconversation just now, we seek your kind assistance in issuing all payments to be banked into the above account with immediate effect.

This account was opened on 7 July 1995 to facilitate your banking process as requested by your Mr. Foo.

a

If you are unable to on-line to the above account, we would appreciate if you could issue a crossed a/c payee cheque to Assured Profit Sdn. Bhd. at the end of this month as all invoices billed to Jaya Jusco Stores are under Assured Profit Sdn. Bhd.

b

- iv) *via* a police report No. 1591/95 made by the claimant on 21-8-1995 which is found at page 57 of CLB, he had in fact confirmed his involvement in the changing of the accounts although his justification for doing so is outrageous:

c

As to my dealings with Jaya Jusco on changing of accounts, it was the collective decision of my partners and they in fact instructed me to do it.

- c) the claimant had authorised the sale of the company's goods to Assured Profit Sdn. Bhd. at very low margin of profit who in turn would sell the said goods to the customers of the company:

d

- i) in the Statutory Declaration of James Loke Kar Choon, COW3, it is declared therein that:

5. Around February 1995, Chris Low said to me that he will give a letter stating the said 20% share profit to me. After Chinese New Year, I helped Assured Profit do some business ie. to sell bags. I represented to clients that I am Pantas Cerah's employee and at the same time representing Assured profit under Chris Low's instruction.

e

6. At the beginning, around February and March, I represented Assured Profit and sold some goods to Pantas Cerah clients eg. Haniffa by issuing Assured Profit invoices. Then basing on those invoices, I issue Pantas Cerah's invoices to Assured Profit for the goods sold. I then issue Assured Profit's invoices to Haniffa.

f

7. This event lasted until end of March ie. Pantas Cerah billing Assured Profit was all paid/settled. All goods sold by Pantas Cerah to Assured Profit are at very low margin/nominal profit. I was instructed by Chris Low to fix a very low price to maximise profit for Assured Profit. In April, I sold Pantas Cerah's good under Assured Profit's bills but the goods taken was not accounted for in Pantas Cerah's account. In beginning of May, the same happened.

*g**h**i*

a It is the submission of the company, apart from the oral evidence of its witnesses and the numerous sworn statements in the affidavits, the claimant's own documentary evidence itself admitted that there was a change in the accounts from that of the company to Assured Profit Sdn. Bhd. The claimant stated in his police report as follows:

b I have reason to believe that my bosses have falsely made allegations about me because I did not co-operate with them in their underground activities. Therefore, I believed my partners fixed me up by lodging a false report that I have taken the company's money and cheated on them. As to my dealings with Jaya Jusco on changing of accounts, it was the collective decision of my partners and they in fact instructed me to do it.

c Assured Profit Sdn. Bhd. was a company whose directors-cum-shareholders were that of the claimant's wife and his mother-in-law.

d COW1, a finance officer with Jaya Jusco Sdn. Bhd. had testified before this court as follows:

I first came to know about Pantas Cerah when a director of the company, Chris Lau (who is the claimant) approached Jaya Jusco to apply a contract as a supplier of luggage for Jaya Jusco sometime in March 1995 ...

e At all material times, I was dealing with Chris Lau and James Loke who were representing Pantas Cerah.

As such, by letter dated 14 July 1995, Chris Lau on behalf of assured profit informed Jaya Jusco of the following:

f With reference to the above matter and out teleconversation just now, we seek your kind assistance in issuing all payments to be banked into the above account with immediate effect.

This account was opened on **7 July 1995** to facilitate your banking process as requested by your Mr. Foo.

g If you are unable to on-line to the account, we would appreciate if you could issue a crossed a/c payee cheque to Assured Profit Sdn. Bhd. at the end of the month as all invoices billed to Jaya Jusco are under Assured Profit Sdn. Bhd.

Your kind attention and immediate action is highly appreciated.

h The above letter was signed by the claimant as a director of Assured Profit Sdn. Bhd.

i

COW3, an employee of the company in his testimony before this court stated that he was selling goods on behalf of Assured Profit Sdn. Bhd. under the instructions of the claimant's wife. It is also in his evidence that he had arranged for goods to be sold by the company to Assured Profit Sdn. Bhd. and the same goods were subsequently sold by assured Profit Sdn. Bhd. to various customers of the company. This witness admitted making a statutory declaration implicating the claimant. This witness also made a police report similar to the contents of his statutory declaration dated 6 October 1995.

It is the contention of the claimant that his dismissal was without just cause or excuse, in breach of natural justice and an unfair labour practice. The company has not been able to substantiate its allegation of misconduct on the part of the claimant or a balance of probabilities. The letter of dismissal has not assigned any reason for the dismissal of the claimant and can be assumed that there was no reasonable cause for dismissal. To warrant the severe punishment of dismissal there must be gross misconduct.

The learned counsel for the claimant has cited a series of Malaysian and foreign authorities to define minor and gross or serious misconduct and the appropriate punishment to be meted out according to the various degrees of culpability. This court does not intend to go into the definition of gross misconduct or wilful misconduct as it is not a court of law hearing a criminal case. The claimant was dismissed for his conduct related to his employment and was not facing a criminal trial here. The company's case is not a criminal case, it is about the conduct of a senior executive. For the purpose of this adjudication the court will examine the facts and circumstances which lead to the claimant being dismissed. The court has to be convinced the company has reasonable grounds to believe the claimant has committed those acts alleged. It is the submission of claimant "that in order to establish wilful misconduct, the court must be satisfied that the person who did the act knew that he was doing something wrong and yet did it notwithstanding that knowledge or, alternatively he did it quite recklessly not caring whether it was the right or wrong thing, regardless of the results of what he was doing". Even applying the verbatim submission quoted above, this court has no doubt the claimant knew what he did was wrong.

There is another issue raised by claimant that there was no domestic inquiry before the dismissal. Thus there was a total failure of natural justice and the conduct of the company in effecting the dismissal of the claimant was an unfair labour practice. It is now settled a defective or no domestic inquiry is not fatal to the employer's case.

- a* In a reference under s. 20(3) of the Industrial Relations Act 1967, it is the duty of the court to determine whether the dismissal is with or without just cause or excuse. In order to make such a finding the court has to identify the employer's reasons or principal reason for dismissal and whether in the circumstances that dismissal was fair or unfair.
- b* In the case before this court, involving more than ten witnesses from both parties and numerous volumes of the documents, it is not disputed those transactions between the company, Assured Profit Sdn. Bhd., Jaya Jusco and Carrefour did take place. The company contends those transactions were illegal and the dishonest acts perpetrated were to the detriment of the company.
- c* The claimant, the company alleged, was the brain and mind in the under-cutting business using his wife's company Assured Profit Sdn. Bhd. as a front. The claimant, on the other hand, contends it was a normal, open business transaction involving his wife's business and there was nothing wrong with that. The claimant denied he took part in his wife's business at the expense
- d* of the company's business inspite of convincing evidence of what he did and he conducted himself in systematically transferring the company's customers to his wife's company.
- When an employer employs an employee, it is implied the employee will faithfully with loyalty and honesty further the interest of the employer. There
- e* is a fiduciary relationship between the employer and the employee. An employee, under the payroll of the employer should not do any act which causes detriment to the interest of the employer. The claimant had committed wrongdoings inconsistent with the employer-employee relationship. He had engaged in activities which had conflict of interest with his duties and loyalty
- f* to his employer. He had bitten the hand that had fed him. The claimant was running the business for the company because the other major shareholders were sleeping partners. He was a director of the board cum executive functions. He was adequately paid with a fully maintained company car. An employee in such a position with duties and responsibilities of a chief executive must
- g* be a man of integrity and absolute trust and confidence. The claimant had betrayed the trust and confidence reposed on him. The company had considered reasonably that it was unsafe to continue his employment after what he had done to damage its interest. In my view, acts and conduct of this nature justify immediate dismissal.
- h* This court upholds the claimant's dismissal by the company and dismissed his claim.

i