Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL SUITS NO W–02–317 OF 2000 AND NO W–02–318 OF 2000
GOPAL SRI RAM, ABDUL HAMID MOHAMAD AND MOHD NOOR JJCA
23 APRIL 2001

Labour Law *— Employment — Retirement — Age of — No term on retirement age in contracts of service — Whether retirement age should be 55 or 60 years*

Labour Law *— Industrial Court — Finding of fact — Power of High Court to interfere with finding of fact of Industrial Court — Whether Industrial Court took into account relevant consideration — Whether High Court should interfere with decision of Industrial Court*

The respondents were at all material times employed by the appellant. At the commencement of their employment with the appellant, their contracts of service did not specify the retirement age. It was only much later that the appellant informed the respondents that they would have to retire at the age of 55 years. Eventually the respondents were asked to retire. They took the position that it was not open to the appellant to retire them at 55, and said that they ought to be permitted to work until they turned 60. Their cases were referred to the Industrial Court which held for the appellant. The respondents then applied to the High Court for certiorari, and the application was granted. The learned judge held that the respondents had been dismissed without just cause or excuse, and quashed the award (see [2000] 4 MLJ 314). He then proceeded to award the respondents compensation for the period between the date of dismissal and the date on which each respondent would attain the age of 60 years. The appellant appealed against that order.

Held, allowing the appeal:

(1) The power of the High Court to exercise judicial review is confined to questions of law. It has no jurisdiction in certiorari proceedings to interfere with questions of fact arrived at by the Industrial Court. The court has said so on numerous occasions. Whether the High Court has crossed the line in a given case depends on the facts of that case and on the approach adopted by the judge therein (see p 100F–G).

(2) The Industrial Court took the issues before it through three stages. In the first place, it held that there was no express term in the respondents' contract that they were to retire at 55 years of age. That was an entirely correct finding. Next, the learned chairman of the Industrial Court asked himself the question whether a term was to be implied into the employment contracts of the respondents as to the age at which they would retire. He held that on the facts before him, he was unable to imply a term

into the respective contracts of each respondent that he was to retire either at 55 years or even at 60 years. This was an entirely rational conclusion (see p 101E–F).

(3) The Industrial Court asked itself the right questions. It took into account relevant considerations. It acted in accordance with law. And its decision was entirely reasonable. The learned judge nevertheless interfered with this decision. He termed it as 'illegal' and 'unreasonable'. The court could not agree. The finding by the learned chairman that the age of retirement should be 55 was a finding that should not have been interfered with. It was a case where the Industrial Court rejected the respondents' evidence that they were entitled to retire at 60 years of age. This was a finding of fact based on the credibility of witnesses. It was immune from judicial review. Yet the learned judge set this finding aside and awarded compensation to the respondents until they attained 60 years of age. This was clearly wrong (see p 105A–C).

[**Bahasa Malaysia summary**

Responden-respondent pada setiap masa matan diambil bekerja oleh perayu. Semasa memulakan pekerjaan mereka dengan perayu, kontrak-kontrak perkhidmatan mereka tidak menyatakan tentang umur bersara. Setelah lama kemudiannya perayu telah memaklumkan kepada responden-responden bahawa mereka terpaksa bersara pada umur 55 tahun. Akhirnya responden-responden diminta untuk bersara. Mereka telah mengambil pendirian bahawa adalah tidak terbuka untuk perayu meminta mereka bersara pada umur 55 tahun, dan mengatakan bahawa mereka sepatutnya dibenarkan bekerja sehingga mereka berumur 60 tahun. Kes-kes mereka telah dirujukkan kepada Mahkamah Perusahaan yang telah memutuskan bagi pihak perayu. Responden-responden kemudian telah memohon kepada Mahkamah Tinggi untuk certiorari, dan permohonan tersebut telah dibenarkan. Hakim yang arif telah memutuskan bahawa responden-responden telah dipecat tanpa sebab atau alasan yang adil, dan membatalkan award tersebut (lihat [2000] 4 MLJ 314). Beliau kemudian seterusnya telah mengawardkan responden-responden pampasan bagi tempoh antara tarikh pemecatan dan tarikh setiap responden akan mencapai umur 60 tahun. Perayu telah merayu terhadap perintah tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Kuasa Mahkamah Tinggi untuk menggunakan kajian semula kehakiman terhad kepada persoalan undang-undang. Ia tidak mempunyai bidang kuasa dalam prosiding-prosiding certiorari untuk campur tangan dengan persoalan-persoalan fakta yang diputuskan oleh Mahkamah Perusahaan. Mahkamah telah

memutuskan begitu dalam beberapa keadaan. Sama ada Mahkamah Tinggi telah melampau batas dalam kes ini bergantung kepada fakta-fakta kes tersebut dan pendekatan yang digunakan oleh hakim tersebut (lihat ms 100F–G).

(2) Mahkamah Perusahaan mengambil persoalan-persoalan yang dihadapkan dalam tiga peringkat. Di peringkat pertama, ia memutuskan bahawa tiada terma nyata dalam kontrak responden-responden bahawa mereka perlu bersara pada umur 55 tahun. Ini memanglah satu penemuan yang betul. Kemudian, pengerusi yang arif Mahkamah Perusahaan telah bertanyakan diri sendiri persoalan sama ada satu terma perlu dimasukkan dalam kontrak-kontrak pekerjaan responden-responden berhubung umur mereka patut bersara. Beliau memutuskan bahawa berdasarkan fakta-fakta di hadapan beliau, beliau tidak dapat memasukkan terma dalam kontrak-kontrak setiap responden masing-masingnya bahawa umur bersara adalah pada umur 55 tahun ataupun 60 tahun. Ia adalah satu keputusan yang rasional (lihat ms 101E–F).

(3) Mahkamah Perusahaan bertanyakan diri sendiri tentang persoalan-persoalan yang betul. Ia telah mengambilkira pertimbangan-pertimbangan yang relevan. Ia telah bertindak mengikut undang-undang. Dan keputusannya memang munasabah. Hakim yang arif begitupun telah campur tangan dengan keputusan ini. Beliau telah mentermakannya sebagai 'menyalahi undang-undang' dan 'tidak munsabah'. Mahkamah tidak bersetuju. Penemuan oleh pengerusi yang arif bahawa umur bersara sepatutnya 55 tahun adalah penemuan yang sepatutnya tidak boleh dicampurtangani. Ia adalah satu kes di mana Mahkamah Perusahaan telah menolak keterangan responden-responden bahawa mereka berhak untuk bersara pada umur 60 tahun. Ini adalah satu penemuan fakta berdasarkan kebolehpercayaan saksi. Ia kebal daripada kajian semula kehakiman. Namun begitu hakim yang arif telah mengetepikan penemuan ini dan mengawardkan pampasan kepada responden-responden sehingga mereka mencapai umur 60 tahun. Ini dengan jelas adalah salah (lihat ms 105A–C).]

Notes

For cases on retirement, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 967–968.

For a case on finding of fact by Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 1243.

Cases referred to

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600 (refd)

Waite v Government Communications Headquarters (1983) ICR 653 (refd)

Cyrus V Das (*Steven Thiru* with him) (*Shook Lin & Bok*) for the appellant.
P Kuppusamy (*Thavaselvi* with him) (*P Kuppusamy & Co*) for the respondents.

Gopal Sri Ram JCA:. There are two appeals before us which raised common questions of trite law. They were therefore heard together. At the conclusion of arguments on 5 April 2001, we reserved judgment. The facts that form the core of these appeals may be shortly stated.

The respondent in each of these appeals was at all material times employed by the appellant. At the time they commenced their employment with the appellant, their respective contracts of service did not specify the age at which they would have to retire. It was only much later, several years after the employment had commenced, that the appellant informed the respondents that they would have to retire at the age of 55 years. Eventually the respondents were asked to retire. They took the position that it was not open to the appellant to retire them at 55 years of age. They said that they ought to be permitted to work until they attained 60 years of age. Their cases were referred to the Industrial Court which held for the appellant. The respondents then applied to the High Court for certiorari. The learned judge who heard the application granted it. He quashed the award. He held that the respondents had been dismissed without just cause or excuse. He then proceeded to award the respondents compensation for the period between the date of dismissal and the date on which each respondent would attain the age of 60 years. The appellant has appealed against that order.

The main, indeed, the only point in this case is whether the learned judge transgressed the clear line between his review jurisdiction and his appellate power. It is a point that is covered by much authority. I need only discuss it briefly.

The power of the High Court to exercise judicial review is confined to questions of law. It has no jurisdiction in certiorari proceedings to interfere with questions of fact arrived at by the Industrial Court. We have said so on numerous occasions. Whether the High Court has crossed the line in a given case depends on the facts of that case and on the approach adopted by the judge therein.

In *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 at p 613, this court, after a review of the authorities said:

> Our response to counsel is that each case depends upon its own facts for the appropriate legal result. It is to be noted that neither *Amanah Butler* nor *Swedish Motor Assemblies* were cases that turned upon credibility of evidence. Such findings are in our judgement immunized from judicial review: *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1. Whether a High Court has exercised appellate functions depends upon the approach taken in a particular case. If a judge to whom application is made for certiorari inquires into and disturbs findings of fact based on the credibility of witnesses, he does indeed exercise appellate functions. It is important to remember that in

judicial review proceedings the High Court must accept as gospel findings of fact made by the Industrial Court based on credibility of witnesses. As was observed by Mohd Azmi FCJ in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 at p 757:

> In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them (see Lord Denning's judgment in *Griffiths (Inspector of Taxes) v JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at p 916, and judgment of Lord Diplock in *Bromley London Borough Council v Greater London Council & Anor* [1983] 1 AC 768 at p 821; [1982] 1 All ER 153 at p 159; [1982] 2 WLR 92 at p 100).

It is the ultimate decision of the Industrial Court when looked as a whole that matters. That is the approach suggested by so learned a judge as Mohd Azmi FCJ (as he was then). It is a view plainly binding upon this court. Unfortunately, the learned judge in the present appeal overlooked the limits to the jurisdiction he was called upon to exercise.

In the present instance, it is necessary first to examine what the Industrial Court did and then examine the judge's approach. Only by this process is it possible to say if the High Court exceeded its role as a court of review.

The Industrial Court took the issues before it through three stages. In the first place, it held that there was no express term in the respondents' contract that they were to retire at 55 years of age. That is an entirely correct finding. Next, the learned chairman of the Industrial Court asked himself the question whether a term was to be implied into the employment contracts of the respondents as to the age at which they would retire. He held that on the facts before him, he was unable to imply a term into the respective contracts of each respondent that he was to retire either at 55 years or even at 60 years. This is an entirely rational conclusion. The learned chairman then went on to make a number of findings all of which are important for present purposes.

In the first passage that I consider important, this is what he said:

> In a s 20 reference, a workman's complaint consists of two elements; firstly, that he has been dismissed and secondly, that such dismissal was without just cause or excuse. It is upon these two elements being established that the workman can claim his relief, to wit an order for reinstatement which may be granted or not at the discretion of the court.
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> As to the first element, industrial jurisprudence as developed in the course of industrial adjudication, readily recognizes that any act which has the effect of bringing a contract of employment to an end is a dismissal within the meaning of s 20 of the Act. The terminology used and the means resorted to by an employer is of little significance; thus contractual terminations, constructive dismissals, non-renewals of employment contracts, forced resignations and retrenchments are all species of the same genus which is dismissals. Retirement, likewise, is also a dismissal for the purpose of industrial adjudication under s 20 of the Act.

In this context, the term 'dismissal' carries no implication of fault or breach of discipline, but a purely neutral meaning indicative of the termination of an employment relationship at the instance or behest of the employer. This is in contrast with its common usage of the term in association with some justificatory reason for the employee's termination, eg misconduct, poor performance or breach of conduct.

When an employee's services have been terminated on the grounds that he had attained his retirement age, the just cause or excuse advanced by an employer when the termination is challenged will invariably be a justification based on a contractual provision. An employer will point to the agreement signed between the parties or to a usage or custom in a particular trade to establish his just cause. Or, where an employer is in the position to do so, he might rely on an implied term. The parties to that agreement have agreed, expressly or impliedly, that unless the employee misconducted himself or failed to perform his work satisfactorily, he shall be engaged in the service of the employer until the former attains the stipulated retirement age. Like an employee in a genuine fixed term contract of employment who leaves at the expiration of his fixed term, the retired employee has completed his engagement with his employer for a definite term, on which event, he gracefully retires. That is just cause enough for an employer to formally bring an end to their employment relationship.

In this case, however, the company is unable to rely upon a contractual provision stipulating that the claimant ought to retire at 55 years of age. When retired one year and three months after he attained that age, the claimant complains that he had been dismissed without just cause or excuse. He claims that employees in his category normally retire at 60 years of age. The court is of the opinion that the claimant ought to be permitted to contend that in the absence of a contractually agreed retirement age, he is entitled to work up to the normal retirement age of employees in his category. This requires a determination of what that normal retirement age is, an issue which the court will now address.

The non-existence of a retirement clause in an employment contract cannot mean that no employer can ever bring an employee's service to an end by retiring him at a certain retirement age, or that such an action would be tantamount to dismissal without just cause or excuse. The Court has to constantly remind itself — and the parties before it — that in reference to s 20, the true question posed to the court for adjudication is not whether a termination of an employee's services is lawful in that it was pursuant to a contractual provision or otherwise, but whether the same was for just cause or excuse. A justification based on contractual grounds might be a relevant factor. However, it will certainly not be conclusive of the matter.

A fundamental aspect of industrial adjudication is the proposition that the function of the court is not confined to interpreting and giving effect to the contractual rights and duties or obligations of the parties. The court must have the authority to recognize and even create rights which exists independently of the contract whenever the justice of the matter requires the Court to meaningfully perform the statutory function entrusted to it in the realm of industrial relations, in particular in the resolution of the claims arising out of the conflicting demands, interests and aspirations of the disputing parties.

This is an approach with which I find myself in entire agreement. Quite apart from having the advantage of common sense, it is supported by

respectable authority. In this context, I need only refer to the judgment of Chang Min Tat FJ in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, at p 312 where he said:

> It follows, in our view, that the letter and spirit of the Act which Mr J Puthucheary concedes as extending to protect workmen who are members of a trade union from dismissal without just cause or excuse extend the same protection to a workman who is not a member of a trade union, so that despite the contractual provision of termination by notice, such a workman who considers he has been dismissed without just cause or excuse may make representations for reinstatement. It further follows that on a proper interpretation of the relevant sections of the Act, there is no material distinction between dismissal and termination. Either must be with just cause or excuse to be justifiable; otherwise the Industrial Court may make an award. The only difference is the regard of the employer for the susceptibilities of the workman to the action being taken against him.
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> If this raises the hackles of employers and calls for denunciations about shackles on the freedom of contract, the following extract from the judgment of Gajendragadkar J in *RB Diwan Badri Dass & Ors v Industrial Tribunal Punjab Patiala & Ors* AIR 1963 SC 630 at pp 633–634 will provide the answer:
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> > 'The broad and general question raised… on the basis of the employer's freedom of contract has been frequently raised in industrial adjudications; and it has consistently been held that the said right is now subject to certain principles which have been evolved by industrial adjudication in advancing the cause of social justice. …
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> > The doctrine of the absolute freedom of contract has thus to yield to the higher claims for social justice. Industrial adjudication does not recognize the employer's right to employ labour on terms below the terms of minimum basic wage. This, no doubt, is an interference with the employer's right to hire labour; but social justice requires that the right should be controlled. Similarly the right to dismiss an employee is also controlled subject to well-recognized limits in order to guarantee security of tenure to (industrial) employees.'

In a later passage in his award, the learned chairman directed himself as follows:

> The court's task is therefore to discover what the reasonable expectation or understanding of the employees are at the relevant time concerning the matter of the age at which they can reasonably expect to be compelled to retire. In undertaking this exercise, the court has to consider all relevant facts and circumstances of this case which constituted the employment relationship between the company, on the one hand, and its employees, and the claimant on the other.

This, in my view, is a perfectly correct direction. It has the support of the decision of the House of Lords in *Waite v Government Communications Headquarters* (1983) ICR 653, an authority referred to by the learned chairman in his award. In *Waite*, Lord Fraser summed up the principle applicable to a case as the present as follows (at p 662):

> I therefore reject the view that the contractual retiring age conclusively fixes the normal retiring age. I accept that where there is a contractual retiring age,

applicable to all, or nearly all, the employees holding the position which the appellant employee held, there is a presumption that the contractual retiring age is the normal retiring age for the group. But it is a presumption which, in my opinion, can be rebutted by evidence that there is in practice some higher age at which employees holding the position are regularly retired, and which they have reasonably come to regard as their normal retiring age. Having regard to the social policy which seems to underlie the Act — namely the policy of securing fair treatment, as regards compulsory retirement, as between different employees holding the same position — the expression 'normal retiring age' conveys the idea of an age at which employees in the group can reasonably expect to be compelled to retire, unless there is some special reason in a particular case for a different age to apply. 'Normal' in this context is not a mere synonym for 'usual.' The word 'usual' suggests a purely statistical approach by ascertaining the age at which the majority of employees actually retire, without regard to whether some of them may have been retained in office until a higher age for special reasons, such as a temporary shortage of employees with a particular skill, or a temporary glut of work, or personal consideration for an employee who has not sufficient reckonable service to qualify for a full pension. The proper test is, in my view, not merely statistical. It is to ascertain what would be the reasonable expectation or understanding of the employees holding that position at the relevant time. The contractual retiring age will, prima facie, be the normal but it may be displaced by evidence that it is regularly departed from in practice.

Having thus properly directed himself on the law, the learned chairman went on to conclude on the evidence before him as follows:

The claimant has stated in a general way that he expected to retire at 60 years of age. He refers to three of his colleagues including one Tony Ho who retired at the age of 60. There is also the bald statement by Michael Chin that in his category of employees, almost nobody retires at the age of 55. It is a difficult thing for the court to find on such meagre evidence that the company's normal retirement age for the category of staff to which the claimant belonged is 60 years of age. The incidence of three staff retirements at the age of 60, without any indication of its statistic relevance, does not advance the claimant's case very far. Had the evidence been that the claimant's retirement at the age of 55 was out of the company's norm, the court might well be constrained to inquire into the question as to why the claimant did not have the benefit of an extension of his service beyond the ages of 55 to 60.

The reference to 55 as the retirement age at certain points of the history of the relationship between the company and its employees, when employment matters were dealt with as reflected in the successive collective agreements and the company's human resources department personnel procedures and guidelines, is indicative of 55 being the normal retirement age of the company. Together with the earlier stated matters, the company's actions at certain defining moments of the claimant's career, inter alia, his promotion to a managerial position and the extension of his service when he attained the age of 55 compels the court to view that the claimant had no reasonable basis for contending that he had the reasonable expectation to retire at the age of 60.

This, in my view is a conclusion that a reasonable tribunal similarly circumstanced would have arrived at. It is a conclusion supported by some evidence and well in accordance with the governing principles.

A So it comes to this. The Industrial Court asked itself the right questions. It took into account relevant considerations. It acted in accordance with law. And its decision is entirely reasonable.

The learned judge nevertheless interfered with this decision. He termed it as 'illegal' and 'unreasonable'. I cannot agree. The finding by the learned chairman that the age of retirement should be 55 is a finding that should not have been interfered with. It is a case where the Industrial Court rejected the respondents' evidence that they were entitled to retire at 60 years of age. This was a finding of fact based on the credibility of witnesses. It was immune from judicial review. Yet the learned judge set this finding aside and awarded compensation to the respondents until they attained 60 years of age. This was clearly wrong.

For the reasons given, these two appeals succeed. The orders of the learned judge are set aside. The award of the Industrial Court in respect of each respondent is restored to file. The respondents must pay the costs of this appeal and the costs incurred in the court below. The deposits in court are to be refunded to the appellant.

My learned brothers, Abdul Hamid Mohamad and Mohd Noor Ahmad JJCA, have read this judgment in draft and have expressed their agreement with it.

Appeals allowed.

Reported by Wong Ee Lynn