Surteco Pte Ltd *v* Siebke Detlev Kurt and another suit
[2011] SGHC 74

Case Number : Suit No 560 of 2009
Decision Date : 30 March 2011
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Tan Yew Fai (Y F Tan & Co) for the plaintiff; Defendant, in person.
Parties : Surteco Pte Ltd — Siebke Detlev Kurt

Employment Law – Contract of Service – Breach

Employment Law – Termination

30 March 2011 Judgment reserved.

Tan Lee Meng J:

Introduction

1 The plaintiff, Surteco Pte Ltd ("the company"), summarily dismissed its former employee, the defendant, Mr Detlev Kurt Siebke ("Mr Siebke"), and sued him for damages for breach of his employment contract. Mr Siebke, who denied having breached his employment contract, counterclaimed for the payment by the company of his remuneration as well as other benefits, including relocation costs.

Background

2 The company manufactures and markets paper or plastic edge bandings, synthetic resins, impregnated paper laminates or foils and roller shutters.

3 On 22 January 2007, the company hired Mr Siebke as its Area Sales Manager, Asia. He was in charge of sales in a number of countries, including Hong Kong, Pakistan, Sri Lanka and Vietnam. He was paid a monthly salary of $10,750, plus a monthly transport allowance of $1,000. He was also provided with a laptop computer by the company. His monthly salary was revised to $10,850 in April 2008.

4 Apparently, the company was quite dissatisfied with Mr Siebke's performance. Its managing director, Mr Hans Lennart Klingeborn ("Mr Klingeborn") contemplated the termination of Mr Siebke's employment contract between the end of 2007 and May 2008 but no action was taken "out of compassion" for the latter's livelihood. It was not until May 2008 that Mr Klingeborn informed Mr Siebke that his employment would be terminated. Mr Siebke proposed that he be redeployed to set up a warehouse and distribution point in India for the company's products. This proposal was accepted and Mr Siebke went to Chennai on numerous occasions to prepare the groundwork for setting up the said warehouse in India between May and November 2008.

5 Subsequently, the company scuttled its plans for the Indian warehouse. Mr Klingeborn claimed that to make it easier for Mr Siebke to find another job elsewhere, he gave the latter a retrenchment

letter dated 19 November 2008, which stated that he had lost his job as a result of the company's cost-cutting measures in the light of the global economic situation. Mr Siebke, who was given the required notice of six months, was informed that he was to work "as normal" during the notice period and that references for jobs within or outside the Surteco group would be available upon request.

6 The company contended that after being "retrenched", Mr Siebke's performance became worse. As it did not want him to become a bad example to other staff, he was informed by Mr Klingeborn on 25 March 2009 that he would be given "garden leave" until 31 May 2009. On the same day, Mr Siebke returned his laptop computer to the company.

7 After conducting checks on the laptop computer returned by Mr Siebke, the company discovered from his e-mails and "Skype" conversations with his friends and customers that he had breached his duties to the company under his employment contract. The company claimed that the information retrieved from the laptop computer showed that Mr Siebke had been doing his own sideline business and had told his friend that he had released the company's confidential Customers List to an outsider.

8 The company decided to summarily dismiss him in April 2009. All further payments to Mr Siebke were immediately stopped.

9 Mr Siebke responded by instructing M/s Luther LLP to issue a letter of demand to the company for sums allegedly owed to him by the company on 15 May 2009. As the company did not pay him the amount claimed, Mr Siebke commenced MC Suit No 17380/2009L on 9 June 2009.

10 The company instituted the present suit to recover damages from him for his breach of contract and for orders compelling him not to release the company's Customers List. Mr Siebke then successfully applied for an order to transfer MC Suit No 17380/2009L to the High Court. By virtue of an Order of Court dated 26 November 2009, both the suits in the High Court were consolidated.

The company's suit against Mr Siebke (Suit No 560 of 2009)

11 The success of the company's suit against Mr Siebke hinges on whether it was entitled to dismiss Mr Siebke summarily in April 2009.

12 In *Sinclair v Neighbour* [1967] 2 QB 279, Sachs LJ pointed out at 289 that it is well-established law that a servant can be instantly dismissed when his conduct is such that it amounts to a wrongful act inconsistent with his duty towards his master or is inconsistent with the continuance of confidence between them. In *Cowie Edward Bruce v Berger International Pte Ltd* [1999] 1 SLR(R) 739, Warren Khoo J explained at [39]-[40] the right of an employer to summarily dismiss an employee in the following helpful terms:

> In each case, it is a matter of degree whether the act complained of is of the requisite gravity. It has been said that it must be so serious that it strikes at the root of the contract of employment, that it destroys the confidence underlying such a contract: *Jackson v Invicta Plastics* Ltd [1987] BCLC 329 at 344, *per* Peter Pain J.
>
> The relevancy and effect of any misdeed complained of must, it seems to me, be judged by reference to its effect on the employer-employee relationship. It also seems to me that in judging the relevancy and effect of the acts complained of, account must be taken of the habits and attitude of the employer at the relevant time. They cannot be judged totally in a vacuum.

13 The company asserted that it had the right to dismiss Mr Siebke for a number of serious breaches. The first concerned his sideline business of selling aluminium handles to his customers in Europe without its approval. This breached clause XIII of Mr Siebke's employment contract, which provided as follows:

> The Employee will place his entire knowledge and work capacity at the disposal of the Employer. All paid or unpaid sideline work of the Employee requires the previous written approval of the Employer.

14 The data in the laptop computer used by Mr Siebke revealed that he had been actively engaged in his sideline business between December 2007 and March 2009. According to Mr Klingeborn, Mr Siebke spent about 5% of his office hours on his private business. Mr Siebke claimed that he had been given permission to "wind down his personal business incrementally while at his job with [the company]" because he could not abruptly cease his personal business at the material time. This was vehemently denied by Mr Klingeborn, who said that Mr Siebke had informed him that his sideline business was not doing very well and that it would be wound up before the latter started work at the company. Mr Klingeborn explained in his affidavit of evidence-in-chief ("AEIC") at para 10 as follows:

> During my job interview of [Mr Siebke] ..., I asked [him] what he was doing for a living then. I was informed by [Mr Siebke] that he was running his own business of supplying Aluminium Handles to his customers in Europe which he procured from suppliers in Malaysia and China. He assured me personally that he would wind up and conclude this Handle business completely before commencing his employment with the Plaintiffs. [Mr Siebke] further told me that his personal business was not doing well in any event. I also [specified] to [him] the Plaintiffs' stand that [his] own business must be completely stopped before starting with the Plaintiffs and that [he] could not be running his own business while working for the Plaintiffs, not even for a short overlap of time. Hence, even before offering [Mr Siebke] the job with the Plaintiffs, parties had already agreed that [his] own business must be completely concluded before commencing work at the Plaintiffs.

15 I accept Mr Klingeborn's evidence that Mr Siebke was not allowed to conduct his own business after he joined the company.

16 Despite a court order and repeated requests, not a single document pertaining to his own business was produced for inspection. Mr Siebke initially claimed that he had no such documents. However, when cross-examined, he admitted that the documents could be in one of the numerous boxes that he kept in Thailand, where he now works.

17 Mr Siebke insisted that he did not conduct any sideline business but his explanations bordered on the ridiculous. A couple of examples will suffice. The first concerns a Skype chat with one Ms Lynna Puah on 13 November 2008, during which he stated that he had made contacts with two new customers, and that one of them would meet him at the Frankfurt airport in December 2008. Mr Siebke claimed that what he really meant was that he was going to meet an old friend's son as well as the son's friend after having breakfast with his old friend. This story could, by no stretch of imagination, match what he had told Ms Puah during the chat.

18 The second example relates to a Skype chat between Mr Siebke and one Mr Domink Fruth ("Mr Fruth") between 31 January to 1 February 2008, during which the latter stated that he had just signed a contract and would send a copy of the contract to Mr Siebke. Mr Fruth added that he "would transfer the money after [Chinese New Year]" and that he will have "a nice letterhead designed for [Mr Siebke's] company". Mr Siebke then forwarded his bank account number to Mr Fruth

and specified that the "contract" was to be sent to his personal email address and not to his company email account. The company rightly contended that if Mr Siebke was not conducting his own business in January/February 2008, which was one year after he joined it, there would have been no reason for Mr Fruth to send him a contract, for money to be transferred to Mr Siebke and for a letterhead to be designed for Mr Siebke's own business. Mr Siebke's explanation for the conversation with Mr Fruth was contrived and inconsistent. He testified that Haefele Pte Ltd, the German company for whom Mr Fruth works, wanted to do business in Vietnam and as a representative office in Vietnam was not allowed to get any funds, Mr Fruth could not receive his salary. That was why he wanted Mr Fruth to design a letterhead for him so that he could render an invoice to the said representative office to enable him to be paid Mr Fruth's salary, after which he was to pass over the money to the latter. Mr Siebke then changed his evidence and said that Mr Fruth's company has had a representative office in Vietnam for the past eight years and that Mr Fruth had been controlling that office from Singapore. It was thus obvious that Mr Fruth has had no problems getting paid in Singapore for his work in Vietnam. Mr Siebke could not furnish a proper explanation as to why Mr Fruth could not continue to receive his salary in Singapore. I have no hesitation whatsoever in rejecting Mr Siebke's contrived explanation of the very plain language used in his chats with Mr Fruth between 31 January and 1 February 2008, which clearly revealed that he was conducting a sideline business of his own while being employed by the company.

19 It is also worth noting that Mr Siebke stated in his Skype chat with one Mr Gerd Lentze ("Mr Lentze") on 14 August 2008 as follows:

> They once told me that I ought not/should not continue to operate my own company – then I removed it from the register so that there would no longer be any trace of it at the registration office in Singapore .... The customers in Germany aren't interested – I continue to use the company name – that has no validity under German law.

20 I thus find that Mr Siebke breached his employment contract by continuing to run his sideline business while being employed by the company.

21 Another complaint by the company is that Mr Siebke breached his employment contract by distributing the company's confidential Customers List to others. Mr Klingeborn explained in his AEIC at para 54 as follows:

> … [A] competitor laying their hands on the Plaintiffs' complete customers list would be getting a completely confidential list of very sensitive and useful information that is not possible to obtain from the public domain.... With the exact internal road map against the Plaintiffs, a competitor would be in the perfect position [to] pre-empt the requirements and needs of the Plaintiffs' customers when the competitor approaches the customers. The competitor knows from the purchase histories and details exactly what kind of edge bands any particular customer needs and the quantities thereof.... The Customers List removes any need for the competitor to start from scratch when attempting to win market share from the Plaintiffs. This is an unfair advantage. They would then be in a good position to recommend comparable edge bands and quote the appropriate prices to beat the Plaintiffs, knowing the Plaintiffs' specific prices at which it sells to the customer .... A competitor would also be able to know the Plaintiffs' cost prices .... These are the Plaintiffs' industrial secrets.

22 The company asserted that Mr Siebke admitted in his Skype chat with Mr Lentze on 16 March 2009 that he had just given the company's entire Customers List to a friend who sells wood-processing machines. The relevant part of the transcript of this conversation is as follows:

Siebke: I just had a friend here; he sells wood-processing machines.

Lentze: and ... so

Siebke *I given him our entire customer list for a start*.

Lentze: what???

Siebke: he was as pleased as a little child ... *12 years and more work the whole of South-east Asia*.

Lentze: it must have been the deal of his life.... you can sell that customer list several times over to different people for some really big bucks... *isn't that rather disreputable, my friend*, what you've done there??? *You scoundrel*

Siebke: *you know – I don't care .....*

Lentze: be careful that it *doesn't amount to industrial espionage*.

Siebke: *that's what it was ....*

Lentze: as sweet as revenge is, be careful that it doesn't come out, if it does your good reputation is finished and perhaps you will get hit over the head.

Siebke: I've given them to him – he's okay – he'll keep it to himself- what's more there's no competition he sells edging machines... *If I went to Rehau – to the direct competition – who produce the same stuff – that would be really underhand*.

Lentze: go on do it.

Siebke: *but I still have a copy at home; let me first get out of the company – and when I've got the last dollars*.

[emphasis added]

23 When cross-examined, Mr Siebke denied having given the Customers List to his friend or that he had a copy of the said List in his house. He said that he had talked "nonsense" with Mr Lentze and that his words may be regarded as sheer "bravado". I was not convinced by this explanation. As for what he meant by the words "12 years and more work the whole of South-east Asia", which appeared in the context of his reference to the Customers List in his Skype chat, he claimed that this referred to his own stay in Singapore and South-east Asia. This explanation made no sense. I thus find that Mr Siebke breached his employment contract by handing over the Customers List to an unauthorised recipient.

24 Undoubtedly, by conducting his own sideline business and by distributing the company's Customers List to another party, Mr Siebke had breached his employment contract in a manner that entitled the company to dismiss him summarily when it discovered the breaches in April 2009. It is thus unnecessary for me to consider whether or not the company's other assertions that he had abused his medical leave and spoken ill of its top executive and its products are good grounds for the summary dismissal.

The company's remedies

25 Having summarily dismissed Mr Siebke, the company contended that he is obliged to return 50% of the remuneration and benefits paid to him during his period of employment because he had not

worked exclusively for it in accordance with his contract. The amount claimed was $169,486.09.

26 Damages for breach of contract must be proven by the claimant. In *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782, the Court of Appeal observed (at [60]):

> In contract, as in tort, causation must first be proved before the issue of remoteness is addressed: see *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004) vol 1 at para 26-029. As was stated in *Monarch Steamship Co, Limited v Karlshamns Oljefabriker (A/B)* [1949] AC 196 ... at 225, it is established law that the claimant may recover damages for a loss only where the breach of contract was the "effective" or "dominant" cause of that loss.

27 The court added (at [62]) that instead of formal tests for causation in contract, common sense is relied on as a guide to decide whether a breach of contract is a sufficiently substantial cause of the claimant's loss.

28 In the present case, Mr Siebke's sideline business did not compete with the company's business. Even so, the company wanted to claw back 50% of the remuneration paid to him because it estimated that he must have wasted half his time in the office on his sideline business. However, when cross-examined, Mr Klingeborn readily agreed that it is not possible to quantify the time an employee spends on his official work and personal work during office hours. There being no evidence that the company has suffered a loss of $169,486.09 as a result of Mr Siebke's sideline business or personal chats, the claim by the company for this amount is dismissed.

29 As for the disclosure of the Customers List by Mr Siebke, the company claimed the rather extravagant sum of $782,000.00. It pointed out that its net profit for the first quarter of 2009 was lower than that for the first quarter of 2008 by $518,000 while the decrease of its net profit for the second quarter of 2009, when compared to the second quarter of 2008, was $264,000. There was no satisfactory evidence from anyone in relation to the causal connection between the distribution of the Customers List and the decrease in net profit for the first and second quarters of 2009. When cross-examined, Mr Klingeborn testified that while he "strongly believed" that there was a connection between the drop in sales and the release of the Customers List, the company had no "hard evidence" against Mr Siebke. That being the case, the company failed to prove that it is entitled to the $782,000.00 that it claimed from Mr Siebke.

30 The company also made an excessive claim against Mr Siebke for loss of profits due to Mr Siebke's poor work attitude. To begin with, it pointed out that the gross profit for the markets under Mr Siebke's charge, namely Hong Kong, Sri Lanka, Pakistan and Vietnam fell by $123,289.00 in 2008. It added that in view of the time expended by Mr Siebke on his personal chats and gossip during office hours as well as his ill discipline and poor job attitude, he should be liable for the said decrease in profits in 2008. It cannot be overlooked that the company claimed that it knew quite soon after hiring Mr Siebke that his performance was poor. Mr Klingeborn said that the company did not dismiss Mr Siebke earlier on because of compassionate grounds. In fact, when Mr Siebke's services were no longer required in November 2008, the company decided to make it easier for him to find another job by retrenching instead of sacking him. He was even told that the company would furnish a reference for him if he needed a reference to find a new job. In these circumstances, the company is in no position to claim damages from him for his poor performance. More importantly, there was no serious attempt by the company to prove a causal link between Mr Siebke's actions and its decrease in profits in 2008. The company claim for loss of profits, amounting to $123,289.00, is thus dismissed.

31 As there was no proof of the actual loss sustained by the company as a result of Mr Siebke's

breaches of his employment contract, I award the company nominal damages of $1,000.

32 The company also applied for an injunction that Mr Siebke be restrained from using or disclosing to third parties "confidential information/documents and/or trade secrets of [its] business or any part thereof which were obtained by [him] while in [its] employment, including [its] Customers List". I hold that the company is entitled to this injunction.

33 Finally, I order Mr Siebke to deliver to the company all copies of the latter's Customers List that are still in his possession.

Mr Siebke's suit against the company (Suit No 1020 of 2009)

34 In his suit, Mr Siebke claimed that he was entitled to be paid his salary, transport allowance and other benefits until May 2009.

35 As I have found that the company had grounds to summarily dismiss Mr Siebke in April 2009, he is only entitled to be paid his benefits until the day he was summarily dismissed. The company's case is that it decided to dismiss him on 20 April 2009 and that Mr Siebke was only told about this decision on 29 April 2009 because he was then on "garden leave" and could not be contacted. Mr Siebke said that he could have been contacted. I hold that the relevant date of summary dismissal is 29 April 2009, the date when Mr Siebke was told about the company's decision to dispense with his services. As such, Mr Siebke is entitled to be paid until this date. However, he must refund to the company $2,500, the sum paid to him as a "travel advance".

36 As for Mr Siebke's claim for moving costs amounting to $7,050, clause XVIII(4) of the employment contract provides that such costs cannot be claimed by an employee who has been dismissed as a result of his breach of the said contract. As for bonuses, these are discretionary and considering Mr Siebke's conduct and the fact that he was on garden leave because the company did not approve of his attitude and work performance, his claim for a bonus cannot be taken seriously.

37 Finally, Mr Siebke claimed $20,000 under clause XV of the employment contract, which requires the company to pay him this sum within 30 days of the termination of his employment as consideration for complying with the covenants contained therein for one year after the termination date. The covenants restrain Mr Siebke from soliciting the company's staff and clients, having business dealings with the company's clients, interfering with the goods and services of the company and being employed, engaged in or interested in a business in Asia which competes with the company's business. The company's case was that the covenants are binding on Mr Siebke but he is not entitled to the $20,000 because he breached the covenants. However, there was no evidence that Mr Siebke breached the covenants after the termination of the employment contract on 29 April 2009. As such, Mr Siebke is entitled to the $20,000.

Costs

38 I will hear the parties on costs.