Saldur Rahman v Mayban General Assurance Bhd and Another
[2005] SGHC 88

Case Number : OM 5/2005

Decision Date : 11 May 2005

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Lim Seng Siew (Ong Tay and Partners) and S K Kumar (S K Kumar and Associates) for the applicant; M P Rai (Cooma and Rai) for the respondents

Parties : Saldur Rahman — Mayban General Assurance Bhd; San Hup Seng Engineering Pte Ltd

Employment Law – Workman claiming compensation for injury under Act subsequently filing civil suit for damages without giving notice to Commissioner for Labour – Whether workman's claim deemed withdrawn because suit commenced – Whether workman's civil action null for failure to withdraw claim under Act before filing action in court – Sections 33(1), 33(2)(a) Workmen's Compensation Act (Cap 354, 1998 Rev Ed)

11 May 2005

Kan Ting Chiu J:

1 This was an application by a workman (hereinafter referred to as "the applicant") to set aside the decision of the Commissioner for Labour ("the Commissioner") which refused to allow him to proceed with his claim for compensation made under the Workmen's Compensation Act (Cap 354, 1998 Rev Ed) ("the Act").

2 The salient facts are:

(a) the applicant was injured on 1 March 1999;

(b) a claim under the Act was made on 9 March 1999;

(c) the applicant filed District Court Suit No 798 of 2002 ("DC 798/2002") on 27 February 2002 for damages against his employers but did not notify the Commissioner of the suit; and

(d) DC 798/2002 was deemed to have been discontinued on 3 October 2003 through inaction on the applicant's part.

3 After the action was deemed to have been discontinued, the applicant applied to the Commissioner to proceed with his claim but the Commissioner declined.

4 The Commissioner referred to *Chua Ah Beng v The Commissioner for Labour* [2002] 4 SLR 854 ("*Chua Ah Beng*") and held that the applicant's claim was deemed to have been withdrawn when the applicant commenced his writ action. The Commissioner explained:

> 15. [I]n the case of *Chua Ah Beng* … the claimant … has exhausted all his remedies under common law. The claimant then wanted to return to the claim under the Act. [Tay Yong Kwang JC] rejected the attempt on the basis that section 33(2)(a) of [the Act] clearly prohibits concurrent proceedings. Tay JC held that the only logical solution was to hold that the claimant was deemed to have withdrawn his claim under the Act when he informed the Commissioner that he was going to commence an action in Court.

16. I am of the view that this case warrants the same decision as that in *Chua Ah Beng*. Tay JC, in ruling on section 33(1) in *Chua Ah Beng*, held that a claimant may make a claim under the Act if he discontinues his action before it has been determined by in [*sic*] any court. This is [the] logical converse of the situation in *Ying Tai Plastic*. Unfortunately, the common law action in this case determined as a failed action after it was deemed to be discontinued due to delay by the claimant. In **Tan Kim Seng v Ibrahim Victor Adam** [2004] 1 SLR 181, the Court of Appeal, in considering the purpose of O.21 R. 2(6) which governs the deemed discontinuance provision, held that the provision is to ensure that expeditious prosecution of the action by the Plaintiff or face the prospect of the action being deemed discontinued.

17. In these circumstances, I find that the claimant is not able to return to his claim under the Act given that his common law action has been determined to be a failure. Since section 33(2)(a) of the Act makes it clear that there can be no concurrent proceedings, applying Tay JC's reasoning in *Chua Ah Beng*, I find that the claim under the Act is deemed to be withdrawn.

5 In *Chua Ah Beng*, a workman was injured in the course of his employment. A claim for compensation was filed under the Act. The workman was not satisfied with the compensation assessed and filed an action for damages against his employers.

6 Before filing the action, his solicitors informed the Commissioner of his intention and asked that the claim "be kept in abeyance until the conclusion of the civil matter", and the Commissioner replied:

> Since your client … wishes to claim damages under the Common Law in respect of the above accident, please note that *this office will take no further action on this matter*. Please let us know the terms of settlement under Common Law and a copy of the Court Judgment, if any, in due course. [emphasis added]

7 The action was heard and dismissed. The appeal against the dismissal met with the same result. When the workman applied to reactivate his compensation claim, the Commissioner took the position that he was not entitled to do that. The workman then applied for an order to set aside the Commissioner's order.

8 Tay Yong Kwang JC (as he then was), who heard the application, dismissed it and held:

> 38 … The plaintiff is asking the court to order the Commissioner for Labour to reinstate and to assess his claim. The defendant very candidly informs me that the practice adopted thus far is to allow applications under [the Act] (such as the plaintiff's in this case) to lie dormant while the workman pursues his remedy in court. This practice obviously cannot stand in the light of what I have said about s 33(2)(a) of [the Act]. As long as an application exists before the Commissioner for Labour, whether it is active or dormant, the plaintiff cannot maintain his action in court. In the *Ying Tai Plastic* case, the Court of Appeal said the "right to compensation under the Act lies dormant while he pursues his common law action". It is the "right to compensation" and not "the claim filed" that lies dormant. The Court of Appeal also made it clear that the right to maintain a court action revives only when the application under [the Act] is withdrawn.
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> 39 I accept that no objection was taken on this point in the earlier court proceedings and that *the plaintiff was not put to an election of remedies.* However, s 33(2)(a) of [the Act] is a mandatory statutory bar to court proceedings. The only logical solution in these circumstances is to hold that *the plaintiff is deemed to have withdrawn his claim under* [*the Act*] *when he*

informed the Commissioner for Labour that he was going to commence an action in court. There is therefore no application before the Commissioner for Labour to restore for assessment and no order of certiorari or of mandamus will therefore be made. The plaintiff is out of time under s 11(1)(b) of [the Act] but he has the avenue open to him in s 11(4) where he can seek to persuade the Commissioner for Labour to excuse the delay within the terms of that provision. I add here that the withdrawal of an earlier application under [the Act] should not be a bar to a further application if it otherwise complies with [the Act].

[emphasis added]

9 It was against that background that Tay JC held that the workman's claim was deemed to have been withdrawn, and that he could file a fresh application if he could persuade the Commissioner for Labour to allow him to do it out of time.

10 In the present proceedings, Mr Rai, counsel for the applicant's employers, argued that the applicant's claim should also be treated as having been withdrawn when he filed DC 798/2002 and, therefore, he should not be allowed to continue with it.

11 There is an important difference in the facts. In *Chua Ah Beng*, the workman's solicitors had written to the Commissioner and received the reply referred to in [6] above. As Tay JC noted, the workman was not put to an election of remedies. Reading the Commissioner's letter, it was not clear whether he had agreed to keep the claim in abeyance as the workman had requested, or whether, by stating that he would take no further action on the claim, he was treating it as withdrawn.

12 Substantial hardship could result if claims were held not to have been withdrawn in those circumstances as any action filed would then be a nullity and any judgment obtained would be unenforceable, and any payments made pursuant to a judgment probably recoverable. It was proper and reasonable to deem such a claim to have been withdrawn and to preserve the validity of the action.

13 In the present case, however, there was no communication with the Commissioner. There was nothing that could support or justify a deemed withdrawal since the applicant had not informed the Commissioner of his decision to sue in common law, and the Commissioner had not informed the applicant that he would take no further action on the claim.

14 In this situation, therefore, the claim was clearly barred by s 33(2) of the Act which states that:

No action for damages shall be maintainable in any court by a workman against his employer in respect of any injury —

(*a*) if he has applied to the Commissioner for compensation under the provisions of this Act; …

See *Chua Ah Beng* at [31] sub-para (5) and *Rahenah bte L Mande v Baxter Healthcare Pte Ltd* [2002] SGHC 320 ("*Rahenah*"), where Judith Prakash J held at [16] that on a proper reading of the Court of Appeal's decision in *Ying Tai Plastic & Metal Manufacturing (S) Pte Ltd v Zahrin bin Rabu* [1982–1983] SLR 117, the effect of s 33(2)(*a*) is that:

[A]n injured employee deprives himself of the ability to exercise his right to sue his employer at common law for the period that the application remains alive. If he changes his mind about his

course of action, the employee is at liberty to *withdraw his claim for compensation* and then start a civil suit. Until such withdrawal he cannot start the civil suit. [emphasis added]

15 Mr Rai suggested that s 33(1) should apply instead. The provision states:

Nothing in this Act shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted an action for damages in respect of that injury in any court against his employer or if he has recovered damages in respect of that injury in any court from his employer.

16 Mr Rai's argument was that whereas s 33(2)(*a*) relates to the right to make a common law claim, s 33(1) relates to a right to claim for compensation, which is the right the applicant is seeking in the present case.

17 Section 33(1) cannot help the applicant as it states that the workman does not have a right to compensation *if he has instituted an action for damages*. That applies to cases when the workman files an action for damages first and then seeks compensation under the Act. The applicant claimed compensation first and then filed the action. Section 33(1) does not apply to his case.

18 For the foregoing reasons, when a workman makes a claim for compensation, and then files a common law action without withdrawing the claim, the action is a nullity. Prakash J had made it clear in *Rahenah* at [18] that the workman must inform the Commissioner of the intention to withdraw, and that it is not sufficient that the intention is formed but not notified to the Commissioner. The common law action filed in this case did not have any effect on the compensation claim because it is a nullity.

19 Mr Rai argued that it is wrong for a workman to make a compensation claim, then file an action without notice to the Commissioner, proceed with the action to its finality and when the action fails, seek to carry on with his compensation claim. (The applicant's case had not yet progressed to trial when it was deemed to be discontinued.)

20 I agree, but no lawyer worthy of a practising certificate will deliberately file a null action and prosecute it. If that were done inadvertently, that would very probably come to light through discovery or interrogatories, when the defendant(s) in the action would want to know if there had been a compensation claim, and the outcome of it. This is not a loophole that can be exploited.

21 In the circumstances, I found that the compensation claim was not affected by the common law action and allowed the application.