Chew Nam Fong Ronny *v* Continental Chemical Corp Pte Ltd and another [2011] SGHC 166

Case Number : Suit No 230 of 2009/T

Decision Date : 08 July 2011

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Lee Tau Chye (Lee Brothers) for the plaintiff; Roland Tong (Wong Tan & Molly Lim LLC) for the second defendant.

Parties : Chew Nam Fong Ronny — Continental Chemical Corp Pte Ltd and another

Contract – Employment

8 July 2011 Judgment reserved.

Lai Siu Chiu J :

1 In this case, Ronny Chew Nam Fong ("the plaintiff") sued the first defendant, Continental Chemical Corporation Pte Ltd ("Continental"), and ChemOne Holdings Pte Ltd ("the second defendant") for severance payment allegedly owed to him under a contract of employment. Continental was a company that manufactured chemicals. The second defendant is the holding company of Continental and its affiliated companies. Shortly after the plaintiff had commenced this suit against Continental, the company went into receivership prior to the implementation of a scheme of arrangement approved by its creditors. The plaintiff then applied for leave which was granted, to add the second defendant to the suit. The plaintiff did not apply to court for leave to continue his action against Continental. Instead, according to the defendants, he filed a Proof of Debt of his claim with the administrator of Continental's scheme of arrangement.

The facts

2 The plaintiff was previously employed by Nuplex Industries, Hong Kong Ltd ("Nuplex") as the regional general manager for its resins business in Asia, with an annual remuneration of $450,000. In November 2007, the plaintiff was put in touch with Hadiran Sridjaja (who is known as "M Y Ling"), the Vice Chairman of both defendants. On 11 December 2007 M Y Ling persuaded the plaintiff to sign a contract of employment ("the contract").

3 The contract was executed on the second defendant's letterhead. The first paragraph stated:

> We are pleased to offer you [the plaintiff] employment with **ChemOne Holdings Pte Ltd** on the following terms and conditions.

4 The contract laid out the plaintiff's scope of work as follows:

> 1) APPOINTMENT
>
> You will be employed as **Regional General Manager, Specialty Chemicals**with effect from 1 April 2008. In this position, you shall report administratively to the Chief Executive Officer of [Continental] and functionally to the Vice Chairman [of the second defendant]. You will be

responsible for the P.A & Plasticizer business in respect of which we expect you to engage in market pull-through approach which will require you to be active with customers' customers.

5 The contract made it clear that it was offered by:

ChemOne Holdings Pte Ltd

M Y Ling

Vice Chairman

6 It was the evidence of the second defendant's human resources Vice-President Chua Kah Tian ("Chua") that a second letter of offer of employment identical to the one described in [3] to [5] was prepared on Continental's letterhead prior to the commencement of the plaintiff's employment but it was never signed by the plaintiff. On his part, the plaintiff testified he had not even seen the second letter of offer until after the commencement of these proceedings.

7 The plaintiff started work as Continental's Regional General Manager (Specialty Chemicals) on 1 April 2008. His initial responsibilities were to formulate and implement the business strategy for Continental's Phthalic Anhydride and Plasticizer business. By May 2008, his responsibilities had been increased to overseeing operations and trading activities in: (1) a chemical factory in Panyu City, Guangzhou Province, the People's Republic of China ("the Panyu plant"); (2) Continental BioEnergy Singapore Pte Ltd (an affiliated company of Continental) and (3) Royal Chemie Indonesia (a related company managed by the second defendant). He reported to the Chief Executive Officer of Continental but functionally to the Vice-Chairman of the second defendant.

8 On 10 October 2008, Continental announced in an internal email that the plaintiff was to be re-designated as Regional General Manager (Resins), with a particular emphasis on the tolling business at the Panyu plant (a tolling business is one where the tolling company manufactures *other* companies' proprietary goods on their behalf for a fee). This was in effect a demotion. There was some unexplained delay in the issuance of the official letter setting out his new job scope and responsibilities, and the plaintiff only received it on 7 November 2008. His monthly salary was reduced to $16,000 from $25,000 purportedly to reflect his diminished job scope. There was some evidence during the trial where the plaintiff suggested that he had been re-designated *twice* – once on 10 October 2008 and again on 7 November 2008. On the documentary evidence, the most probable explanation was that the plaintiff had been verbally informed of his re-designation in October 2008 before the formal letter of re-designation was issued to him on 7 November 2008. It is unlikely that the plaintiff would have been re-designated twice when only one formal letter of re-designation exists.

9 The plaintiff's employment was terminated on 8 January 2009. The letter of termination issued that day on Continental's letterhead ("the termination letter") and signed by Chua stated:

As per clause 3 of your letter of employment with the company dated 11th December 2007, please be informed that the company would like to terminate this agreement with effect from 9th January 2009 by paying you two (2) months basic salary in lieu of two months notice. Your last day of service with the company is therefore 8th January 2009.

The company will arrange to make the following payments to you:

Last month salary from 1st January to 8th January 2009

Two months basic salary in lieu of notice.

Outstanding annual leave balance if any.

Please make arrangement to return immediately whatever company properties and documents issued to you during the course of your employment with the company.

The company would like to wish you all the best in your future endeavours.

It is noted that the termination letter did not allude to the plaintiff's poor performance.

10 The plaintiff took the position that he was entitled to severance payment of two years' salary plus an annual bonus as provided for in the contract; he did not accept the two months' salary as adequate compensation for the termination of his employment. When the defendants refused to recognise his claim the plaintiff commenced this suit.

The pleadings

11 In his (amended) statement of claim, the plaintiff alleged that his contract of employment was with Continental and/or the second defendant. He relied on cll 3, 4, 5 and 6 of the contract for his claim (see [19] below). There was also a claim for the sum of $3,210 that the plaintiff had paid to a law firm, Clifford Law Corporation as retainer to act on his behalf in April 2008, which he claimed the defendants had agreed to reimburse him but failed and/or refused to do despite his request in September 2008.

12 The second defendant's defence was that it had entered into a contract of employment with the plaintiff as an agent on behalf of Continental. Alternatively, if the second defendant was found to be bound by the contract of employment, its defence was that the plaintiff's employment had been terminated due to his poor performance. Consequently, the second defendant argued that the plaintiff was not entitled to his claim.

The issues

13 The main issue in this case was whether the second defendant was contractually bound by the contract of employment. If it was not, then the plaintiff's claim would fail. However, if the second defendant was so bound, the court would then have to determine whether the plaintiff was entitled to the severance payment stipulated in the contract he had with the second defendant.

Was the second defendant bound by the contract?

14 On the very clear terms as set out in [3] to [5], there was no doubt that the contract was one made between the second defendant and the plaintiff.

15 Counsel for the second defendant argued that the "form" of the contract was misleading, and that the plaintiff's "real employer" was in fact Continental. He explained that the contract was issued on the second defendant's letterhead to avoid infringing a non-competition clause with the plaintiff's previous employer Nuplex (on which advice had been sought from Clifford Law Corporation). Further, the plaintiff's scope of duties and functions all related to Continental's operations (the manufacturing and sale of chemicals) and not to the second defendant's functions which were purely administrative

in nature. Moreover, Continental paid the plaintiff his salary, his office was in Continental's offices on Jurong Island and the plaintiff's own name card and *curriculum vitae* indicated that he worked for Continental. For those reasons, the second defendant submitted that the plaintiff's real employer was Continental and the terms of the contract did not bind the second defendant.

16 There was a certain amount of confusion in the submissions presented by the second defendant's counsel. The plaintiff was seeking to enforce the *contractual* obligations allegedly owed by the second defendant to him. Whether the second defendant was or was not the plaintiff's "real employer" was not the point – the fundamental issue was whether the second defendant owed obligations to the plaintiff *under the contract*. For example, it is open for X to contractually hire a domestic helper to work for Y, who pays the salary and provides the accommodation. That Y is the domestic helper's "real employer" is irrelevant when considering X's contractual obligations to the domestic helper.

17 On the face of the contract, the second defendant did owe contractual obligations to the plaintiff as party to the contract. Since there was no dispute as to the *interpretation* of what the words "ChemOne Holdings Pte Ltd" in the contract meant, the second defendant was bound by the contract unless it could show either that: (a) the contract should be void; or (b) the contract should be rectified to reflect the plaintiff's true employer.

18 However, the second defendant did not submit that the contract was void, nor did it argue that the contract should be rectified. In any event, it is unlikely that such contentions would have succeeded. Accordingly, there is no reason not to enforce the contract against the second defendant.

Was the plaintiff entitled to severance payment?

19 In his statement of claim, the plaintiff had relied on cll 3, 4, 5 and 6 of the contract. The provisions state:

> 3) **NOTICE PERIOD**
>
> Termination of employment may be effected at any time by either party given to the other two (2) months' written notice or two (2) months' salary in lieu of such notice.
>
> 4) **SEVERANCE PROTECTION**
>
> Should your employment be terminated by the Company for reasons other than poor performance, gross negligence, gross misconduct or criminal conviction in a Court of Law you shall be paid severance payment of two times annual salary.
>
> 5) **REMUNERATION AND TAX**
>
> Your annual salary shall be **S$300,000.00** per annum (over 12 months). Any tax related to this employment with the Company shall be your own responsibility. You will be awarded a sign-on bonus of S$40,000 in July 08. Should you terminate your employment voluntarily within the first year of service, the sign-on bonus should be repaid in full to the company.
>
> 6) **PERFORMANCE BONUS**
>
> You will participate in the Company's Variable Bonus Scheme whereby the amount of bonus

paid shall be based on your performance and the Company's financial performance. The formula to be used is:

EBITDA – Interest Payment x 1%

The formula may be revised from time to time with the mutual agreement of both parties.

If you resign before the Variable Bonus is paid, which is usually in the first quarter of the following financial year, you shall not be entitled to any payment of the Variable Bonus.

20 As noted earlier (at [9]), the termination letter was issued pursuant to cl 3, and not on the basis of poor performance. During cross-examination, Chua (see N/E 189) explained why that had been done:

> Let me just says that as a human resource practitioner for 32 years, I always have the staff interest in mind. I do not want to serve him a letter that mentioned the word "termination" in order that he has got good job prospect and that's why you refer to my last paragraph, I mentioned that, you know "We wish you all the best in your future endeavour", so that if this letter, Ronny is to use it to seek employment, he stand a better chance of being successful. That's my only intention. And that is why I mention to him poor performance to his face during the termination itself, so that he knows that it's for poor performance. I'm trying to save him. That's my honest intention. And that's why I give him "poor" on a performance improvement plan in the first place as well, not --- not disciplinary case.

In other words, the second defendant did not want to jeopardise the plaintiff's future career prospects by stating in the termination letter that he had been dismissed for poor performance.

21 Under the common law, an employer can rely on any reason (whether or not known to him) existing at the time of dismissal to justify the termination of employment: see *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722 ("*Aldabe Fermin*") at [49]. This rule arises from the fact that the common law treats contracts of employment as a sub-species of contract, hence they are subject to the general rules of contract: e.g. see *D'Cruz v Seafield Amalgamated Rubber Co Ltd* [1963] MLJ 154 at 156. Accordingly, as the judge in *Aldabe Fermin* held (at [49]), the phrase "wrongful dismissal" is simply a term used to describe an employer's repudiatory breach of an employment contract. Just as parties are not generally obliged to explain the reasons for terminating a contract, employers are also not generally obliged to justify the termination of employment.

22 Where, as in this case, there is a provision in the employment contract stipulating severance payment when employment is terminated except for certain reasons, it is in all likelihood the parties' intention that the employer must prove that the termination of employment *was* for one of those reasons. This is generally due to the fact that in most cases it is the employer who has the particular knowledge of why the employment was terminated. In my view, the effect of clause 4 of the contract is that unless the second defendant can show that the plaintiff's employment was terminated for the reasons stated therein, it would be liable to make the severance payment.

23 As it was the second defendant's case that the plaintiff's employment was terminated for poor performance, the only issue for determination was whether that had been established on a balance of probabilities by the evidence adduced before this court.

24 The plaintiff, having being re-designated once, assumed two separate roles while at Continental. The purpose of the re-designation was to allow the plaintiff to focus on a narrower scope

of responsibilities in the hope that his performance would improve. This was clear from the promise made by M Y Ling to the plaintiff that if his performance improved, he could be reinstated to his former role. It was also M Y Ling's evidence (see N/E 221-222) that:-

> Our policy is, your Honour, when we have a member to join the group, we try to ... manage as long as possible because we want to explore the potential of each members. Maybe there are not good in product A, they may be good in B and C. And this is where our family nurture and value.

25 Given the underlying purpose behind the re-designation, it seems self-evident that the poor performance leading to the termination of the plaintiff's employment must have been poor performance *in the last held role*. It would make no sense to give an employee a second chance to prove himself in a different or reduced job scope if the employee was still being assessed on the basis of his performance in his *prior* role. Put another way, *if* the plaintiff had *not* performed poorly in his last held role yet his employment was still terminated, the only conclusion has to be that his employment was terminated for reasons other than poor performance. It follows therefore that the second defendant must prove poor performance from 10 October 2008 onwards, when the plaintiff was re-designated as the Regional General Manager for the Resins business in the Panyu plant.

26 The Key Performance Indicators ("KPI") for the plaintiff's new role were formally set out on 7 November 2008 in his re-designation letter as follows:

> 1. Responsible for identifying and developing effective regional sales strategies and plans for the target markets.
>
> 2. Solicit and maintain favorable contact with potential and existing clients as well as taking the lead to identify and assess prospective customers in order to capitalize on potential business opportunities for revenue growth.
>
> 3. Develop and monitor marketing and sales programs and activities as well as manage customers in the region effectively and successfully.
>
> 4. Achieve breakeven (i.e. US$0 EBITDA [Earnings Before Interest, Tax, Depreciation and Amortization] for the resins business by Jan 2009.
>
> 5. Achieve the target of at least US$3.2 millions EBITDA per month on an annualized basis for the Resins business in China making up of US$1.5 millions per month for the Tolling business and US$1.7 millions per month for own business by 3rd quarter of 2009.
>
> 6. Develop and take ownership of weekly business, financial and operational actions plan and targets to achieve organizational goals and business objectives including EBIDTA targets as set out in point 4 and point 5 above.
>
> 7. Establish good, effective systems, structures, processes, culture, human resources management practices and standard operating procedures to support the effective execution of the units' business strategies and action plans.
>
> 8. Other task and responsibility as may be assigned to [the plaintiff] from time to time.

27 The second defendant relied upon the testimony of Chua and M Y Ling to establish the plaintiff's poor performance. Their evidence was that between 11 and 16 November 2008, the plaintiff embarked on numerous customer visits in China to vigorously market the tolling business. The plaintiff

was required to write reports on those visits and this task was allegedly performed inadequately because the reports were too short. However, the length of a report is hardly a key indicator of how informative a report is – indeed it is a virtue to be concise. As Chua admitted under cross-examination, he was not involved in the operations of the tolling business, so his ability to independently gauge the adequacy of the plaintiff's reports was doubtful. Neither did M Y Ling explain how or why the reports were inadequate simply because they were brief.

28 The second defendant's witnesses also testified that one Wong Nam Soon ("Wong") had expressed his unhappiness at the plaintiff's performance in an email dated 21 November 2008. Since Wong was not called as a witness, his concerns cannot be considered as evidence that the plaintiff's performance was *in fact* deficient. To do otherwise would be to infringe the rule against hearsay. At most, what the email did establish was that Wong had *expressed* his unhappiness with the plaintiff's performance (which may be circumstantial evidence proving the plaintiff's poor performance), not that Wong's discontent was in fact justified.

29 In my view, the strongest evidence showing the plaintiff's poor performance was his repeated failure to provide a plan to ensure that the Resins business at the Panyu plant would break even by January 2009. It is not disputed that the plaintiff and one Martin Ni ("Martin") were jointly responsible for producing a business plan with the target of breaking even by January 2009. On 23 October 2008 M Y Ling wrote in an email to the plaintiff and Martin:

> What we need is the business plan that will enable [Panyu plant] to break even by Jan 09, ie we have to make EBITDA min 0 by that time.
>
> ...
>
> The existing plan that you send is break even by May 09, this is too late and I am afraid we do not have the patience to wait.
>
> We have to reduce cost or improve business ASAP.
>
> Please review and make the changes.

30 However, the required business plan was never produced. Instead, the plaintiff had produced a plan in early October 2008 with a May 2009 breakeven date and insisted that only the later breakeven date was attainable. On 21 November 2008, the plaintiff wrote to M Y Ling stating:

> The target/expectation is breakeven by Jan. Martin and I have submitted our best top line plan based on prevailing marketing conditions and our own production limitations – and this shows a breakeven in May 2009.

31 A day later the plaintiff again wrote in an email to M Y Ling:

> If Martin and I can achieve Ebitda neutral for [Panyu plant] in 12 months by May 2009 ... this would be considered by many as an excellent achievement especially when benchmarked against [a competitor's] performance.

It was therefore apparent that the plaintiff had failed to produce or implement the required business plan targeting breakeven by January 2009. It was also not contended that the resins business had broke even (somehow) in January 2009.

32 The plaintiff submitted that given the global financial turmoil at the end of 2008, the breakeven date of January 2009 was "unrealistic and not achievable over a short period". But no evidence was tendered to substantiate that bare assertion. While the court should take judicial notice of the dire straits of the world's economy towards the end of 2008, the court cannot, without more, make the assumption that the January 2009 target was unachievable as a result.

33 The plaintiff also submitted that the infrastructure improvements and licensing requirements he had requested for the tolling businesses were ignored or not implemented by Continental. There was an email dated 25 October 2008 sent by the plaintiff to Martin where the plaintiff listed the alleged problems with the Panyu plant's tolling business, some of which were:

> Business licence does not allow for manufacture and sale of acrylics and aminos. This considerably reduce the market place for our resins business.
>
> Utility cost at average USD120/MT due to inefficient boiler (too big) and use of diesel makes entry into resins difficult.
>
> No licence to do USD market – and in south, this represent almost 50% of the market.

34 Although the second defendant did not dispute the existence of such flaws in the Panyu plant's tolling business, M Y Ling's testimony was that the plaintiff was expected to use the pre-existing facilities to achieve the forecasted target. The plaintiff did not explain *why* or adduce specific evidence to show *how* the pre-existing facilities made it unrealistic to achieve the January 2009 deadline. It is one thing to request improvements to make one's job easier and another to say that one's job cannot be done unless the improvements are made.

35 Hence, on the evidence presented to the court, the second defendant has proven that the plaintiff failed to implement a business strategy that could achieve a January 2009 breakeven date. The plaintiff did not present sufficient evidence to satisfy the court that the January 2009 deadline was unattainable or even unreasonable. It is the prerogative of the plaintiff's employers to set certain performance targets. In the absence of a convincing justification, the failure to achieve those targets constitutes poor performance. For these reasons, the second defendant has succeeded in proving that the plaintiff's employment was terminated for poor performance. It follows that the plaintiff was entitled to neither severance payment nor performance bonuses under the contract of employment.

36 As such, the plaintiff fails in his claim which is dismissed with costs to the second defendant. The dismissal includes the plaintiff's claim for $3,210 for legal fees paid to Clifford Law Corporation on which no submission was made by both parties in their closing submissions.

37 Upon inquiry of counsel for the plaintiff, the court was informed that the second defendant had made an Offer to Settle on 21 April 2011 under O 22A r 9(3) of the Rules of Court (Cap 322, R5, 2006 Rev Ed), of paying the plaintiff $24,000 in full and final settlement of his claim. The plaintiff did not accept the offer by the deadline of 5 May 2011. As the terms of the Offer to Settle were more favourable to the plaintiff than the dismissal of his action, the second defendant shall have its costs on a standard basis up to and including 21 April 2011 and thereafter its costs shall be on an indemnity basis.