

Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd
[2013] SGHC 279

Case Number : Suit No 1036 of 2012 (Registrar's Appeal No 286 of 2013 and No 287 of 2013)
Decision Date : 26 December 2013
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Plaintiff in person; M K Eusuff Ali and Lucinda Lim (Tan Rajah & Cheah) for the defendant.
Parties : Wee Kim San Lawrence Bernard — Robinson & Co (Singapore) Pte Ltd

Civil Procedure – striking out

Contract – contractual terms – implied terms

Employment Law – contract of service – breach

26 December 2013

Woo Bih Li J:

Introduction

1 The plaintiff (“P”) was an employee of the defendant which is a department store (“the Employer”). He apparently tendered his resignation on 24 August 2012. The Employer paid him four months’ salary in lieu of notice together with cash for his unconsumed annual leave even though his contract of employment stipulated for a payment of only two months’ salary in lieu of notice.

2 P claimed that although it was he who tendered his resignation, this was a case of constructive dismissal. He alleged that the Employer was persecuting him because he is a homosexual. He filed the present action on 6 December 2012 against the Employer for damages for the constructive dismissal.

3 The Employer filed Summons No 3064 of 2013 on 18 June 2013 with a supporting affidavit to strike out his claim.

4 In response, P filed an affidavit on 15 July 2013.

5 In turn, the Employer filed another application being Summons No 3969 of 2013 on 31 July 2013 to expunge paragraphs 28 and 29 of P’s affidavit.

6 Both summonses were heard by an Assistant Registrar (“AR”) on 6 August 2013. The AR ordered paragraphs 28 and 29 of P’s affidavit to be expunged. He also struck out P’s claim in the main action.

7 P then filed Registrar’s Appeal No 286 of 2013 against the decision to strike out his claim and Registrar’s Appeal No 287 of 2013 against the decision to strike out the two paragraphs of his affidavit. Both appeals were filed on 20 August 2013.

8 I heard both appeals together on 9 September 2013. After hearing arguments, I dismissed each of the appeals. P filed a notice of appeal to the Court of Appeal on 9 October 2013. His notice of appeal stated that the appeal is against the whole of my decision given on 9 September 2013. It is not clear to me whether the appeal is against both of my decisions that day or only one. I will assume it is against both but P should have stated clearly what he is appealing against. I state my reasons below.

The court's reasons

9 Before I elaborate, I would mention that at the hearing before the AR, P was represented by Mr Faizal Shah of Samuel Seow Law Corporation. At the hearing before me, he represented himself. His notice of appeal to the Court of Appeal was issued by Peter Low LLC.

10 I will deal first with the Employer's application to expunge paragraphs 28 and 29 of P's affidavit.

11 Apparently, P had filed an earlier application by way of Summons No 2461 of 2013 on 10 May 2013 to seek discovery of certain documents as parts of those documents had been redacted. On 24 June 2013, an AR allowed his application in respect of two documents and ordered the Employer to disclose the redacted portion of each document to P's solicitors save for a paragraph in each of the two documents. The AR also directed that copies of the documents be provided only to P's solicitors and that P "may make reference to the said documents, but shall not exhibit the said documents, in any affidavit filed henceforth from the date of this [o]rder". Presumably, the Employer then complied with the order and made discovery of the redacted portions to the extent ordered by the AR.

12 Subsequently, P filed his affidavit on 15 July 2013 in response to the Employer's application to strike out his claim. Paragraphs 28 and 29 of his affidavit cited passages from the two documents.

13 The Employer then filed its application to expunge those two paragraphs in the light of the order on 24 June 2013 that P was not to exhibit these two documents. The Employer's position was simple, *ie*, that though P had, technically, not directly exhibited the two documents in his affidavit, he had done so indirectly by reiterating the contents of parts of the two documents in his affidavit. In doing so, he was effectively doing that which he was not supposed to do.

14 P's position was that those paragraphs were of paramount importance. Unfortunately for him, that was not the point.

15 I agreed with the Employer's argument. By citing parts of the two documents, P was trying to circumvent the order of the AR made on 24 June 2013. Although that order did allow P to make reference to the documents, that must be seen in the context of the next part of the order which precluded P from exhibiting the documents. Taken as a whole, it was clear to me that the part of the order which allowed P to make reference to the documents did not allow him to cite the actual contents. For example, P could refer to the fact that the document was sent but not to the actual contents unless he was citing those parts which the Employer had all along no objection to.

16 Therefore, I dismissed his appeal against the order expunging paragraphs 28 and 29 of his affidavit.

17 I come now to P's more substantive appeal which was against the decision to strike out his claim.

18 Here again, the Employer's position was simple. The Employer did not agree that P had been

persecuted and was therefore constructively dismissed when P tendered his resignation. However, for the purpose of its application to strike out, it was prepared to proceed on the assumption that P was indeed constructively dismissed. The terms of P's employment were contained in a Letter of Appointment ("LOA") dated 2 October 2006 which P had counter-signed to signify his acceptance thereof. Clause 4 of the LOA was the relevant term. It stipulated, *inter alia*:

...

After the confirmation, written notice of termination from either party will be two (2) calendar months or two (2) calendar months' salary in lieu of such notice without assigning any reasons whatsoever.

...

19 Accordingly, the Employer submitted that even if P had been constructively dismissed, he was only entitled to two months' salary (leaving aside the question of mitigation) as the Employer was in any event entitled to terminate his employment by paying him two months' salary.

20 The Employer relied on *Alexander Proudfoot Productivity Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin and another appeal* [1992] 3 SLR(R) 933 ("*Alexander Proudfoot*") where the Court of Appeal said at [13]–[15]:

13 ... The normal measure is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he could reasonably be expected to earn in other employment. If the contract expressly provides that it is terminable upon say a month's notice, the damages will ordinarily be a month's wages: see *Hartley v Harman* (1840) 11 Ad & E 798. ...

14 If a master who is entitled to dismiss a servant on not less than three month's notice, wrongfully purports to dismiss the servant summarily, the dismissal, being wrongful, is a nullity and the servant can recover as damages for breach of contract three month's remuneration and no more, subject to mitigation; that is to say, remuneration for the three months following the summary dismissal. ...

15 Under cl 7.01 all that the appellants needed to bring about a lawful termination of each of the contracts of employment was to give a month's notice or pay a month's salary in lieu of notice. That was all the quantum of damages which each of the respondents was entitled to.

21 The Employer also submitted that such a measure of damages was reiterated by the Court of Appeal in the more recent case of *Teh Guek Ngor Engelin nee Tan and others v Chia Ee Lin Evelyn and another* [2005] 3 SLR(R) 22 at [20].

22 I should add that it was P who insisted on being paid four months' salary as compensation. Initially, the Employer did not agree to this quantum but eventually did so. It was therefore possible that there was a concluded agreement to settle any claim by P for the termination of his employment. However, for the purpose of the striking out application, the Employer chose not to rely on that argument in case it was a triable issue. Instead, the Employer relied solely on the argument that in law, and regardless of the reasons for the alleged constructive dismissal, all that P was entitled to was two months' salary and he had in fact received four months' salary.

23 In the circumstances, P's allegation that the termination of his employment was because he is a

homosexual and the evidence which he was trying to rely on to prove his point were irrelevant.

24 However, P relied on the case of *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* [1997] 3 WLR 95 ("*Malik*") to claim that he was entitled to damages over and above what cl 4 of the terms of employment had stipulated.

25 In *Malik*, the provisional liquidators of a bank had terminated the employment of the applicant (and another applicant) on grounds of redundancy. The applicant contended that he was not able to obtain employment in the financial services industry because of the stigma attaching to him as a former employee of the bank notwithstanding that he was innocent of any wrongdoing. He submitted a proof of debt claiming substantial sums as compensation for the alleged stigma. The liquidators rejected his proof of debt. He appealed. A judge decided that the evidence in support of his claim failed to disclose a reasonable cause of action. His appeal to the Court of Appeal failed. However, his appeal to the House of Lords was allowed. The House of Lords was of the view that the bank was under an implied obligation to its employees not to conduct a dishonest or corrupt business. This was an aspect of the trust and confidence required if an employment relationship is to continue in the manner impliedly envisaged by an employment contract. If the applicant was handicapped as a consequence of the bank's corruption, the financial losses were in principle recoverable if it was reasonably foreseeable that this type of loss was a serious possibility as a consequence of a breach of the trust and confidence (see [12]–[14] and [24]–[25]).

26 It must be understood that *Malik* was a trial of a preliminary issue concerning whether the applicant's evidence disclosed a reasonable cause of action. The court then went on to make assumptions, see [7], so as to expound on the law of implied terms in an employment contract. In the present case, P is required to show a breach of the implied term of trust and confidence, see also *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [35], [38] and [39]. Although P had pleaded in his statement of claim that the Employer had breached an implied term of mutual trust and confidence, this was a bare allegation as the statement of claim did not disclose any particulars that were relevant to establishing the breach.

27 As regards the circumstances leading to his termination, P neither pleaded that the circumstances were known to others, nor that such circumstances put him at a disadvantage in seeking employment elsewhere. His claim for these "stigma" damages was also not particularised as a breach of contract giving rise to financial loss.

28 Accordingly, *Malik* was of no assistance to P.

29 In any event, the bare fact of his termination cannot be a ground to claim damages other than what he would be entitled to under his employment contract for a lawful termination, even if he was constructively dismissed. Otherwise every employee will be entitled to claim more than what is stipulated in a contractual provision for lawful termination by simply alleging a breach of trust and confidence.

30 In the circumstances, as P had already received more than what he was entitled to under cl 4, his claim was doomed to fail. Accordingly, I dismissed his appeal against the decision to strike out his claim.