Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd
[2004] SGHC 2

Case Number : DCA 17/2003

Decision Date : 09 January 2004

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : B Ganesh and A Jeyapalan (Ganesha and Partners) for appellant; Lawrence Teh and Sean La Brooy (Rodyk and Davidson) for respondent

Parties : Arokiasamy Joseph Clement Louis — Singapore Airlines Ltd

Employment Law – Contract of service – Termination with notice – Continued absence for more than two days – Whether employer entitled to terminate contract of service under s 13 Employment Act – Section 13(2) Employment Act (Cap 91, 1996 Rev Ed)

9 January
2004
Judgment reserved.

Woo Bih Li J:

Introduction

1 The appellant Joseph Clement Louis Arokiasamy ("JC") was an employee of the respondent Singapore Airlines Limited ("SIA"). He was an employee of SIA until SIA purported to terminate his employment by a letter of termination dated 5 March 1997. JC then commenced DC Suit No 4929 of 1997 against SIA for wrongful termination in November 1997. His action was eventually heard in the District Court between March and May 2003 and his claims dismissed. He then appealed to the High Court and his appeal was heard by me after which I reserved judgment.

Background

2 I reiterate the background facts which have been helpfully set out by the trial judge.

3 Between 1989 and 1995, JC was seconded to the Singapore Airlines Staff Union ("SIASU"). During that time, he held various positions in SIASU, including that of Assistant General Secretary. Sometime in 1996, the Corrupt Practices Investigation Bureau ("CPIB") commenced investigations regarding complaints against him. He voluntarily resigned from his posts in SIASU but retained his ordinary membership. On 18 February 1997, JC was charged with certain offences at the Subordinate Courts. As he was unable to raise the bail amount of $20,000, he was remanded in Queenstown Remand Prison ("QRP") pending his trial. While in remand, he received a letter from SIA dated 5 March 1997, the relevant portion of which reads:

> Dear Mr Clement
>
> You have not reported for work since 21 February 1997 nor have you given the company any reason for your unauthorised absence. You have therefore broken your contract of service with the company and your employment is terminated with effect from 21 February 1997. Your last day of service was, therefore, 20 February 1997.
>
> Consequent on your termination, you will be paid your salary up to and including 20 February

1997.

4 JC was subsequently acquitted of the charges brought against him after his trial in June 1997. He then filed the present action.

5 In May 1998, JC asked SIASU to file an application on his behalf to the Industrial Arbitration Court ("IAC") under the Industrial Relations Act (Cap 136, 1985 Rev Ed) to adjudicate the dispute between him and SIA. This request was turned down. He applied to the High Court for a declaration and an injunction to compel SIASU to act pursuant to his request and refer the matter to the IAC. The High Court dismissed his suit: see *Arokiasamy Joseph v Singapore Airlines Staff Union* [2000] 1 SLR 473. He appealed therefrom and his appeal was dismissed by the Court of Appeal: see [2000] 2 SLR 303.

6 Matters were held in abeyance for this suit until September 2000, when JC filed an amended statement of claim. Summary judgment was obtained against JC on part of SIA's counterclaim in July 2001. Upon appeal, the High Court varied the judgment sum in November 2001. No further action was taken by SIA on the counterclaim. In November 2001, SIA filed an application under O 14 r 12 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) for the striking out of various parts of JC's amended statement of claim: in particular, his claim for reinstatement of his employment; his claim that his dismissal was in breach of the principles of natural justice; and his claim for wages up to the date of adjudication. On appeal before the High Court, JC's prayer for reinstatement of his employment remained struck out. MPH Rubin J held that the two remaining questions of natural justice and the ability of JC to claim as damages his wages up to the date of trial be heard at trial. Subsequently JC obtained leave to subpoena 19 witnesses to give evidence orally at trial, subject to directions given relating to the questions that the witnesses be asked. In January 2003, SIA appealed against the directions obtained and filed another application on a question of law to determine whether JC's claim for unfair dismissal was justiciable in the courts. The appeal was dismissed by a district judge in chambers who also made no order on the application in respect of the question of law as that judge was of the view that that specific issue was best dealt with in the impending trial.

7 Eventually, after receiving evidence and submissions, the trial judge dismissed JC's claims.

Issues before the trial judge

8 The trial judge was of the view that JC's remaining claims were, broadly, on three heads:

(a) The first was the wrongful termination of his contract of employment on 5 March 1997: this involved consideration of the Employment Act (Cap 91, 1996 Rev Ed); and the express and implied terms of his contract, which in turn involved discussion of the prevailing collective agreement between SIA and SIASU, SIA's Personnel Procedures Manual ("PPM"), and SIA's employment norms and practices;

(b) The second was a claim for breach of natural justice; and

(c) The third was a claim for unfair dismissal.

9 On these bases, JC prayed for a declaration that the dismissal was null and void; damages, including his continuing salary up to the time of adjudication; interest; and costs. On SIA's part, it submitted that it was entitled to dismiss JC under s 13 of the Employment Act, and JC's various arguments as to unfairness, breach of natural justice, the collective agreement and the PPM were not made out.

10 For ease of analysis, the trial judge summarised the issues as follows:

(a) whether SIA was entitled to terminate JC's employment under s 13 of the Employment Act;

(b) whether any provision under the collective agreement or PPM applied in the present case;

(c) whether natural justice requirements applied and whether there was a breach of natural justice; and

(d) whether there was any unfair treatment that could ground a cause of action against SIA.

11 JC had been represented by solicitors at various times but at the trial he appeared in person. In the appeal before me, he was represented by Mr B Ganesh and Mr A Jeyapalan. His counsel adopted the same issues as summarised by the trial judge, but added another issue which I will come to later.

Whether SIA was entitled to terminate JC's employment under s 13 of the Employment Act

12 Section 13(2) of the Employment Act states:

> An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than 2 days —
>
> (a) without prior leave from his employer or without reasonable excuse; or
>
> (b) without informing or attempting to inform his employer of the excuse for such absence.

13 The trial judge was of the view that:

> 10. Owing to the use of the word "or" within and between (a) and (b), it is plain that the conditions listed at (a) and (b) are disjunctive. In cases where an employee has a reasonable excuse for his absence from work, the onus still remains on him to attempt to inform his employer of the excuse for his absence. An employee is deemed to have broken his contract of employment if no attempt was made to inform his employer of the excuse for his absence, whether his excuse was reasonable or not.

14 Although I agree with the illustration given by the trial judge, I prefer not to describe the conditions in (a) and (b) as being disjunctive. That may give the impression that so long as one of the conditions is satisfied, s 13(2) comes into play. For example, it may give the impression that if the employee does not inform his employer of the reasonable excuse, s 13(2) applies even though the employee has attempted to inform. I am of the view that s 13(2) comes into play if the following conditions apply:

(a) the employee has been continuously absent from work for more than two days; and

(b) the employee does not have the prior leave of the employer and has no reasonable excuse for the absence; or

(c) the employee does not inform and does not attempt to inform the employer of the reasonable excuse.

15 Mr Lawrence Teh, counsel for SIA, submitted that it was not sufficient for JC to have a reasonable excuse. The excuse had to be communicated to SIA by JC or someone on JC's behalf.

16 Mr Ganesh disagreed. He further submitted that even if the conditions I have mentioned apply, s 13(2) does not mean that the contract of employment is terminated automatically. Neither does it allow SIA to terminate the employment of JC without more. I add that Mr Teh did not argue that s 13(2) provided for automatic termination but rather that it allowed SIA to exercise its right of termination should SIA elect to do so.

17 I will first deal with the question whether s 13(2) allows an employer to terminate the contract of employment without more, assuming that the conditions I have set out apply. As Mr Ganesh had relied on a number of cases, I will analyse the cases in chronological order including a case cited by Mr Teh.

18 Mr Teh cited *Lian Yit Engineering Works Sdn Bhd v Loh Ah Fon* [1974] 2 MLJ 41. There, Abdul Hamid J referred to ss 13(2) and 15(2) of the Malaysian Employment Ordinance 1955. Section 13(2) permitted either party to a contract of service to terminate the contract in the event of wilful breach by the other party of a condition of the contract. The Singapore equivalent is s 11(2) of the Employment Act. Section 15(2) of the Employment Ordinance is the equivalent of the Singapore s 13(2). Abdul Hamid J said, at 43:

> In the light of sections 13 and 15 of the Employment Ordinance it would seem clear that a worker who continuously absents from work for more than two days without reasonable excuse commits a wilful breach of the contract of service for which the employer may terminate his service without notice.

19 Therefore, it was implicit in the learned judge's statement that if the conditions in s 15(2) were satisfied this would be tantamount to a wilful breach entitling the employer to terminate the employment without more. There was no requirement for the employer to conduct any inquiry or an investigation. I will say something more later as to whether an employer can terminate without notice under the Singapore equivalent *ie* s 13(2).

20 In *Poh Loy Earthworks Sdn Bhd v Mohd Nasurdin Taib* [1997] 3 ILR 608, the case was heard by the Industrial Court in Kuala Lumpur. It was dealing with s 15(2) of the Malaysian Employment Act 1955 which was in substance similar to the Singapore s 13(2). The Industrial Court said, at 613:

> Even if, but only if, that the claimant was not dismissed by the company on 18 December 1995, which was denied, the company's allegation that the claimant was absent under s 15(2) Employment Act 1955 also could not hold water. Section 15(2) provides:
>
>> 15(2) An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.
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> At para 7 of Award No 55/82 in the case of *National Union of Plantation Workers v Gim Aik Estate Sdn Bhd, Malacca* [1982] CLJ 272 Harun J said:

We also find that there is no such thing as statutory termination. Breach of contract of service and termination of employment are two different things. A breach of contract of service may or may not lead to termination of employment. Section 15 is only a deeming provision … .

Before the company took a drastic action to terminate the claimant, the company ought to give a show cause letter to the claimant alleging of what the company had in mind and if not satisfied then the company should hold a domestic inquiry on him to determine the truth on a balance of probability.

To hold a domestic inquiry on the claimant was a must as his salary was only RM1,200, therefore came under the protection of the Employment Act 1955. Whether this issue was put forward or not at the hearing of the case, it could not be denied as it was considered mandatory under the law. In the recent case of *Said Dharmalingam bin Abdullah v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 CLJ 646 at p 659; [1997] 1 MLJ 352 (Supreme court) his Lordship Mr Justice Edgar Joseph Jr considered s 14 of the Employment Act 1955.

21 The Industrial Court then cited passages from Edgar Joseph Jr J's judgment regarding due inquiry under s 14 of the Malaysian Employment Act 1955. However, in *Said Dharmalingam*, the termination was not pursuant to the equivalent of the Singapore s 13(2) *ie* continuous absence of more than two days. With respect, I am of the view that the Industrial Court had erred in relying on the case of *Said Dharmalingam*.

14. —(1) An employer may after due inquiry dismiss without notice an employee employed by him on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service except that instead of dismissing an employee an employer may —

(a) instantly down-grade the employee; or

(b) instantly suspend him from work without payment of salary for a period not exceeding one week.

(2) Notwithstanding subsection (1), where an employee considers that he has been dismissed without just cause or excuse by his employer, he may, within one month of the dismissal, make representations in writing to the Minister to be reinstated in his former employment.

23 I am of the view that s 13(2) is separate and independent from ss 14(1) and 14(2). Section 13(2) is a deeming provision. If an employee is continuously absent for more than two days without prior leave and without reasonable excuse, or if he did not inform and did not attempt to inform his employer of the reasonable excuse, then he is deemed to have broken his contract. There is no question of an inquiry because it is not for the employer to investigate why the employee is absent. The legislation has put the burden on the employee to inform, or at least attempt to inform, the employer about his reasonable excuse. True, a difficult question may arise if the employee had attempted but failed to inform the employer but that is a separate question. It does not throw the burden on the employer to have a due inquiry in a s 13(2) situation. Consequently, s 14(1) does not apply to a situation under s 13(2).

24 I am reinforced in my view that no due inquiry is contemplated by the discussions before a Select Committee when it was considering the earlier Shop and Office Employees Bill. The relevant provision then was cl 14. The Minutes of Evidence of 6 April 1956 state:

322. Then clause 14 of the Government Bill. You say that clause "indicates that EMPLOYEES if they are continuously absent from work for more than 2 days without leave from their employers or without reasonable leave or excuses will be DISMISSED or in other words will have broken their Contract of Service." The two things are not quite the same, are they? Clause 14(b) merely says:

> A contract of service shall be deemed to be broken by the employee if he is continuously absent from work for more than two days without leave from his employer or without reasonable excuse.

In other words, the clause seeks to say that if such a thing happens, there is no more a contract of service. In fact, it is the law that says that the employee does not work any more. His contract is at an end. It is the employer who dismisses. The distinction is there? — (*Mr Lim Yong Koon*) We will put it that it should be deleted.

323. You prefer that it should be deleted. What is the remedy then that you suggest an employer can have if, in fact, his employee is absent from work for more than 2 days without leave? — If he is continuously absent from work for than 2 days, then we suggest that his pay be cut. That will be a more reasonable attitude for the employer to take.

324. So that an employee can take it upon himself to be absent for 2 days from time to time, and the only penalty he will suffer is a deduction of pay? — (*Mr Han Tew Hong*) Sir, there again it is a repetition of the same clause under the Labour Ordinance – in case a man is absent from his work for more than 2 days without excuse. I stand firm on the ground that the provisions in the Labour Ordinance in this respect should not apply to the Government Bill.

325. Is it quite fair to look at it that way? — Sir, I am only just suggesting it.

326. Would you look at it this way? What is the remedy which the employer has against an employee who persistently remains absent for more than 2 days without leave, and the answer that I have got is that the employer should cut his salary? — (*Mr Lim Yong Koon*) There is another thing, Sir. Employers always give some inducement to their employees to encourage efficiency and hard work. They give bonuses and greater increases in salary to those who merit it. Therefore business houses employees will not usually absent themselves intentionally without very good reasons.

327. Is there any reason why there should not be legislation in case it does happen? — As I have pointed out, Sir, we are afraid that it will be used as a weapon against us. Employers have always a remedy. They can withhold their bonus which is not subject to any dispute. They can give better increments to conscientious workers. That, in itself, would prevent an employee from playing truant, and if you think that that is not enough, then his salary could be cut for those 2 days. I think that is reasonable punishment already.

Mr Ede

328. Mr Chairman, it is not just a case of 2 days. It might be more? — I can assure you that the employees, especially in the business houses, do not like to absent themselves without very good reasons.

329. Is that not covered by the clause itself – "without reasonable excuse"? — I know, but it is hard. We might be up against some employers who are unreasonable and any reason that you

give them might not be acceptable.

Mr Lim Yew Hock

330. There is protection in that the Labour Court will assess whether or not there is a reasonable excuse. The protection is there. Are the representatives satisfied or are they still not satisfied? The point is that it is not the employer who assesses whether or not the excuse is reasonable. It is the Commissioner for Labour? — Sir, I think most of our members have not the intelligence to approach the Labour Court.

25 As for Abdul Hamid J's view in *Lian Yit Engineering* that no notice need be given, I am of the view that a termination notice or letter must be given, otherwise the employee would not know for certain whether his contract has been terminated. Besides, it is not every employer who will terminate the employee's service once two days of continuous absence has lapsed. As in the present case before me, SIA had elected to wait a while longer before terminating.

26 The next case to be considered is *Hongkong Bank Malaysia Bhd v Joseph Stephen* [1998] 3 ILR 1001. That was a case before the Industrial Court, Kuching. There, the Industrial Court said, at 1007:

The effect of s 15(2) of the Employment Act 1955

What s 15(2) really means is that an employee who absents himself in the circumstances set out in s 15(2) is deemed to be in breach of contract. He is not, it must be emphasised here, deemed to have terminated his contract of employment. Upon the occurrence of such a breach of contract, the employer may then proceed to terminate the employee's contract under s 13(2) of the Employment Act 1955. The employer can do so if the circumstances of the case were such as to tantamount to a repudiatory breach of contract by the employee which justifies a termination of the latter's contract of employment.

It must be made abundantly clear here that s 15(2) merely restates the common law principle that the party against whom a breach of a condition or an essential term of a contract has been committed has the option to accept the repudiatory conduct of the party in breach and to terminate the contract forthwith. A breach of s 15(2) of the Employment Act 1955 does not therefore *ipso facto* cause the defaulting employee's contract with his employer to be terminated. There is no such thing as statutory termination of a contract of employment (see *Gim Aik Estate Sdn Bhd v National Union of Plantation Workers* [1982] MLLR 117). The court further reiterates that mere absence in the manner set out in s 15(2) does not tantamount to an abandonment of service and/or an automatic termination of service.

The court would further add that notwithstanding an employer's right to bring the contract of employment to an end by dismissing the defaulting employee, it is always open to the Industrial Court; and indeed it is the duty of the court to consider whether the ultimate disciplinary action of dismissal was warranted. If the court is of the view that dismissing an absent employee was in all the circumstances of the case an excessive disciplinary measure, it is the duty of the court to exercise its statutory authority to intervene in the employer's undue exercise of disciplinary power. The imposition of unnecessarily harsh disciplinary sanctions when the same is not warranted constitutes an unfair labour practice and the court is obliged to hold that the said dismissal was therefore without just cause or excuse.

27 With respect, I do not agree that if the conditions under the Singapore s 13(2) (which is the

equivalent of the Malaysian s 15(2)) are met, the employer will still have to consider whether they are tantamount to a repudiation. That will make the deeming provision meaningless. In my view, once the conditions are met, there is a deemed repudiation and it is for the employer to elect whether to act on it or not. It may be that, as submitted by Mr Teh, the Industrial Court in the *Joseph Stephen* case was influenced by a contractual term in a collective agreement which provided that an inquiry was to be conducted before any disciplinary action was taken against an employee although, even then, the contractual term might not have applied to a situation under the Malaysian s 15(2).

28 The next case is *Dharmaraja @ Abd Malik a/l Abd Wahab v Asian Ceramic Sdn Bhd* [2000] 2 MLJ 282, a decision of K C Vohrah J in the High Court of Kuala Lumpur. There, Vohrah J relied on a decision of Harun Hashim J in *Gim Aik Estate Sdn Bhd Malacca v National Union of Plantation Workers* [Jan–June 1982] MLLR 117 where Harun Hashim J said:

> It is said that the court held that where an employee has been continuously absent from work more than two days in the circumstances described in s 15(2) of the Employment Ordinance ("the Ordinance"), the employer may automatically terminate the employment. We find that the court made no specific reference to s 15(2) of the Ordinance. We also find that there is no such thing as statutory termination. Breach of contract of services and termination of employment are two different things. A breach of contract of service may or may not lead to termination of employment. Section 15 of the Ordinance is only a deeming provision. It cannot be the intention of the legislature that employees automatically lose their jobs whenever an employer fails to pay their wages. Nor do we foresee employees terminating their contracts of service every time an employer delays paying their wages for more than seven days after the due date. In such instances, the employer commits an offence and may be dealt with under s 91 of the Ordinance.
>
> Unlike the employer, there is no penalty clause in the Ordinance against the employee if he breaches his contract of service. The consequence of any such breach is dependent on the conditions of employment and the provisions of the ordinance. Absence without prior leave for more than two days (as in the instant case) is deemed to be a breach of the contract of service by s 15(2) of the Ordinance. If the circumstances of the breach are such that it justifies termination of service, then the employer may terminate the contract of service under s 13(2) of the Ordinance, which provides:
>
>> Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.

29 Vohrah J then concluded at 287:

> If there is an absence of two consecutive days that does not mean that the contract of employment comes to an end automatically nor does it entitle the company to dismiss an employee as of right. The circumstances surrounding the absence must first be considered. In the instant case, there has not even been a breach of contract under s 15(2) as there has been no absence for more than two consecutive working days.

30 I am of the view that a continuous absence of more than two days in the circumstances under the Singapore s 13(2) amounts to more than just a deemed breach of contract. It is also a deemed repudiation. Indeed, when an employee does not turn up for work and has no prior leave or reasonable excuse, he is already in breach of contract. A deeming provision is not necessary to establish a breach but it is necessary to deem the breach a repudiation. It is a different matter if one were to argue that the circumstances under s 13(2) have not been established. For example, if an employee who is absent for more than two consecutive days has given his employer notice of the

reason for his absence prior to the expiry of the two days but the dispute is whether his reason constituted a reasonable excuse, then that is a different issue altogether. It may be that that was what Harun Hashim J and Vohrah J meant when they said that the circumstances of the absence must be considered. Accordingly, absence without prior leave does not in itself bring s 13(2) into play. There must also be the absence of reasonable excuse. However, if the employee does not even inform or attempt to inform the employer of the reasonable excuse, then s 13(2) comes into play. It may be that one may ask how an employer is to establish that an employee has failed to attempt to inform him and then suggest that therefore a due inquiry by the employer is required to establish whether the attempt to inform has been made. However, as I have said, the onus is not on an employer to seek out an employee for his excuse or to find out whether he has attempted to inform the employer of his excuse. The onus is on the employee, if he has a reasonable excuse, to inform and in so doing, to make the attempt to inform. For practical purposes, once the employer does not hear from the employee after more than two days of absence, the employer may terminate. If the employee can establish that he did attempt to inform but for some reason beyond his control the attempt failed, then the termination will not be a lawful one. While I accept that such a possibility will create some uncertainty for an employer, it seems to me that it will not arise often. In any event, an employer who does not wish to face this uncertainty can still conduct his own investigation before termination or choose not to terminate under s 13(2) but under the usual contractual provision which allows termination by giving notice of a certain duration or pay in lieu of that notice.

31 In *CK Lee & Associates v Goh Shaw Yuh* [2002] 3 ILR 645, the Industrial Court in Kuala Lumpur said, in respect of the Malaysian s 15(2), at 651 and 652:

> But there is one other crucial aspect the court feels important to touch upon in respect of *reciprocal duties of employers* to take reasonable steps themselves to investigate and enquire of the background facts causing employee's absences, as much as it is the duty of the employees themselves who have to take reasonable steps to inform their employers, of whatever predicament they are facing or giving rise to the emergency situation.
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> The case of *Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373, (1997) ICR 301 states the proposition that where there is a dismissal, the starting point for analysing the duty of the tribunal in deciding whether or not the dismissal is fair, Phillips J emphasises the importance of scrutinising all the relevant factors:
>
>> … Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?
>
> And he added that the relevant circumstances include "the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do".
>
> *Lynock v Cereal Packaging Ltd* [1988] 510, [1988] ICR 670 described the appropriate responses of an employer faced with a series of intermittent absences as follows:
>
>> The approach of an employer in this situation is, in our view, one to be based on those three words which we have used earlier in our judgment – sympathy, understanding and compassion … .
>
> There is a broad generalisation given by the text, *Harvey On Industrial Relation And Employment Law* under topic "Ill Health and Absenteeism":

So there is a *conflict* between the needs of the business, and those of the employee, and the tribunal must be satisfied that the employer has sought to resolve the conflict in a manner which a reasonable employer might have adopted. *In the course of doing this, he will have to show that he carried out an investigation which meant that he was sufficiently informed of the medical position … . etc*.

(emphasis supplied.)

Again, the onus to get in touch or to try and get in touch is on the employer, although there is a corresponding duty on the employee to take steps or reasonable steps to get in touch and communicate with the employer – see *Mitchell v Arkwood Plastics (Engeneering) Ltd* [1993] ICE 471.

Dismissals which were held as unfair because of no or insufficient consultations with employees include:

a) *Owen v Funditor Ltd* [1976] ICR 350 QBD;

b) *Townson v Northgate Group Ltd* [1981] IRLR 382;

c) *Taylor v Southcott & Co Ltd* [1972] IRLR 78 IT; and

d) *Burdekin v Doland Corrugated Contamers Ltd* [1972] IRLR 9 IT.

In this case, there is no evidence that the firm as an employer had taken any reasonable step to try and investigate or enquire of the claimant's cause for her absenteeism, if there was one, because the claimant has colleagues in the office who would naturally have been put into a state of enquiry, as to what had happened to a fellow worker.

So, the claimant thinking that she had taken sufficient steps to communicate or inform the firm, was naturally surprised to have received the termination letter dated 3 January 1997 on the 8 January 1997 through the course of post, and tried to clear the matter up, but was ignored and turned down by the employer.

The employer had sat arms folded, and threw the burden on the employee to justify her absence, which the claimant has discharged on a balance of probability.

[emphasis in original]

32 I have considered the cases relied upon by the Industrial Court in the case of *CK Lee & Associates*. They do not deal with the equivalent of the Singapore s 13(2). Accordingly they are not on point.

33 Furthermore, although *Lian Yit Engineering* was the first of the cases discussed above, it seems that it was not cited in the subsequent Malaysian cases.

34 Having considered the Malaysian cases discussed above, I remain of the view that if an employee is continuously absent for more than two days without prior leave but has a reasonable excuse, the employer is nevertheless entitled to terminate his contract of service if the employee did not inform or attempt to inform the employer of the excuse. There is no requirement for the employer to have a due inquiry or to investigate the reason for the absence.

35 On the facts before me, JC was apparently also absent from work prior to 21 February 1997. However, SIA did not rely on any period of absence prior to 21 February 1997. Be that as it may, I should mention that on 17 February 1997, JC went for an appointment with CPIB. He rang SIA to use his annual leave from 17 to 19 February 1997. According to SIA, JC had applied for leave from 17 or 18 to 20 February 1997. In any event, it appeared that a union official, one Chan Siew Mun had also approached SIA's Eddie Ong, the immediate superior of JC, to ask for leave for JC until 20 February 1997.

36 As I have mentioned, JC was charged in court on 18 February 1997. On 19 February 1997, there was a *Straits Times* report on his indictment. The last paragraph of the report states:

> [JC's] case will be mentioned again on April 15. He has been released on $20,000 bail.

Unfortunately, the report was not accurate because JC was in fact not able to raise bail and was remanded.

37 It seems to me that JC had a reasonable excuse for being absent from work but whether he had informed or attempted to inform SIA of his absence from 21 February 1997 was the crux of the matter, given my view that an employer is not obliged to conduct a due inquiry or to investigate the reason for absence before applying s 13(2).

38 Mr Ganesh contended that so long as SIA knew that JC was incarcerated, s 13(2) did not come into play. How then would SIA have known? As I have said the newspaper report had inaccurately stated that JC was released on bail and there was nothing in the last application for leave by Chan Siew Mun indicating that JC would require further leave beyond 20 February 1997.

39 Mr Ganesh relied on a conversation that another union official, one Retna Mohan, had with Chew Kai Seng who was Vice-President of Industrial Relations, Human Resource Division of SIA. The trial judge's summary of the evidence of Mr Mohan and Mr Chew and the developments leading to the sending of the termination letter is as follows:

> 15 Retna Mohan ("Mohan") gave evidence that he informed Chew Kai Seng ("Chew") that the plaintiff was unable to raise bail. On the morning of 19 February, Mohan rang Chew and asked Chew whether the latter had read the papers that morning. He mentioned that the plaintiff was unable to raise bail. On cross-examination, he revealed that he knew because he went to court on 18 February, the day the plaintiff was charged. By the time he arrived, the plaintiff's case had been mentioned. One of the plaintiff's relatives informed him that bail of $20,000 had been imposed and the plaintiff was unable to raise it. He had no personal contact with the plaintiff. He recalled Chew's response was that they should wait for the plaintiff to get in touch as a newspaper report could be inaccurate. He explained that he had rung Chew because the plaintiff was a good friend of his and he was concerned. He did not do so in his capacity as a union official and no request for leave was made.
>
> 16 Chew gave evidence also, and his recollection of the conversation was slightly different. In particular, he did not recall being informed that the plaintiff was in remand. His evidence was that on 19 February, he received a telephone call from Retna Mohan. Mohan asked if Chew had seen the papers. Chew replied in the affirmative. Chew also followed on to say that the defendants would wait for the plaintiff to contact them, because the newspaper report may not be accurate. As a result of this conversation, he sent a note dated 19 February 1997 to his superior, the Director of the Personnel Department.

CLEMENT JOSEPH

1 Retna Mohan phoned me this morning asking whether I had read the report in today's Straits Times regarding Clement Joseph.

2 I said I did.

3 Retna asked what the Company was going to do. I said we will see if Clement gets in touch with us as we cannot rely on a newspaper report, which may not be accurate.

4 Retna said although Clement is a union official, the Company should not treat him differently from other staff.

17 This matter was subsequently raised by Director, Personnel, Chris Lee at the defendants' Management Committee meeting held on 26 February 1997. The minutes of the meeting recorded as follows:

9 STAFF AWOL

9.1 A graded staff from Marketing Services was charged in court for corruption. According to newspaper reports he was released on bail. He was on no-pay leave up to 20 Feb. He has not shown up for work, or tried to contact anyone in the Company since. Under the Employment Act, the Company can terminate any employee who is AWOL for more than 2 days. Although he was a Union office bearer, SIASU has asked that he be treated the same as any other staff. The Committee was divided as to whether we should move posthaste to terminate employment. Ag DC suggested that action be withheld for another week. At that point, if he has still not contacted us, we will send him a termination letter.

18 As a result of the Committee's decision to wait, the matter was surfaced again at the next Management Committee meeting, which was held on 5 March 1997. The minutes for the second meeting read as follows:

1 MATTERS ARISING

1.5 Staff Awol

(Para 9.1 of S-9/97-1)

1.5.1 Personnel will send out the letter of termination to the employee in Marketing Services Division who has been AWOL for more than a week. Both Personnel and Marketing Services confirmed that there has been no communication from him during the period.

40 The above summary by the trial judge was not challenged. It appeared that the main, if not the only, discrepancy between Mr Mohan's and Mr Chew's evidence was that Mr Mohan had said that he had told Mr Chew that JC was in remand but Mr Chew did not recollect having been told this. In any event, it was not disputed by Mr Mohan that Mr Chew had said that SIA would wait to see if JC got in touch with them as the newspaper report might not be accurate.

41 Therefore, even assuming that Mr Mohan had told Mr Chew that JC was in remand, Mr Chew had not indicated that that was good enough notification to SIA. On the contrary, Mr Chew had said SIA would see if JC got in touch with SIA.

42 Also, Mr Mohan was not speaking or attempting to speak on JC's behalf nor did he seek to justify or excuse JC's absence for him. In addition, it was not suggested that JC was then aware of the conversation between Mr Mohan and Mr Chew and was under the impression that that conversation would suffice for the purpose of keeping SIA informed.

43 In these circumstances, I am of the view that even if SIA was aware through Mr Mohan of JC's remand this was not sufficient for JC under s 13(2).

44 There was also evidence for JC by another witness, one Mohd Hussain Kassim, that he believed SIA was aware of JC's whereabouts. However as his belief stemmed from what Mr Mohan had told him of his conversation with Mr Chew, I did not place any weight on Mr Kassim's evidence.

45 I agree with the trial judge that s 13(2) imposed an obligation on JC, as an employee, to inform SIA of the reason for his absence. I reiterate that Mr Teh accepted that the obligation would have been discharged if the information was given by someone else on behalf of JC. I accept that mere information is not sufficient, otherwise, for example, a newspaper report would be adequate. Yet such information could be inaccurate, as was in the case before me.

46 The view I have taken does not impose an onerous burden on employees generally. If an employee cannot turn up for work, it is only logical and natural for him to inform his employer of this, as well as the reason, as soon as possible. Section 3(2) effectively allows him two days from the time he should be at work to do so. I am mindful that there may be cases in which the employee cannot carry out this obligation, for example, if the employee is in a coma or has been kidnapped and has no one to inform the employer accordingly. In such cases, the employee would not even be able to attempt to inform his employer. However, while that may or may not call for different considerations, those are not the facts before me. The evidence, as noted by the trial judge in her grounds, showed that JC could have and did contact others. JC's relatives were present in court on the day he was charged *ie* 18 February 1997. On the second day of his remand, he did request to make a call to his aunt and subsequently made the call. On 22 February 1997, an aunt and uncle had visited him. Indeed, Mr Ganesh did not pursue the argument made below by JC that JC was unable to attempt to inform SIA of his whereabouts.

47 While I cannot help feeling some sympathy for JC, I am of the view that he has to bear responsibility for the situation which arose. As I have mentioned, prior to 21 February 1997, one Chan Siew Mun had applied for leave on his behalf up to 20 February 1997. Yet JC did not follow up on this when he was remanded from 18 February 1997 onwards. Furthermore, it was not as though SIA acted immediately after the expiry of two days. They waited for a while more. When no news was received from JC thereafter, they acted by sending the termination letter dated 5 March 1997.

Whether any provision under the collective agreement or PPM applied in the present case

48 The trial judge concluded that neither the collective agreement nor the PPM was applicable. She said:

> **Whether any provisions under a Collective Agreement or Personnel Procedures Manual applied in the plaintiff's case**
>
> 29 The plaintiff's case was that, under his contract of employment, the defendants were required under the Collective Agreement ("CA") and the Personnel Procedures Manual ("PPM") to convene an investigation and disciplinary inquiry, and for the SIASU to be informed. Further, it was the prevailing practice of the defendants in accordance with the Collective Agreement and

the Personnel Procedures Manual to provide employees an opportunity to explain. He referred to s 8-4 of the PPM, which set out procedures for disciplinary inquiries.

30 There were, however, several pieces of evidence that militated against the plaintiff's reading of the documents. The CA did not in fact specify a need to hold a disciplinary inquiry in absence-without-leave cases. The plaintiff was queried about this in cross-examination, and he was unable to pinpoint any section of the CA which was of assistance to him. His view was that the CA was "tied up with the procedures in the PPM" and was to be read together with the PPM.

31 The PPM, on the other hand, was not referred to in any of his appointment letters and the defendants disputed that it formed part of the plaintiff's contract. In any event, reference to the PPM did not assist the plaintiff's case. Although there was a disciplinary inquiry procedure set out at s 8-4, there existed, equally, an automatic dismissal section for absence-without-leave cases, at s 5-4, which read as follows:

> SECTION 5: TERMINATION OF EMPLOYMENT
>
> 5-4 Absence without leave
>
> 1 An employee shall be deemed to have broken his contract of service if he is continuously absent from work for more than 2 days:
>
> (i) without prior leave or without reasonable excuse; or
>
> (ii) without informing or attempting to inform his section or departmental head of the reason for such absence.
>
> 1.1 The departmental head should immediately inform Personnel Manager whenever an employee is absent without leave for more than two days.
>
> 1.2 On receipt of such notification, Personnel Manager will write to the employee informing him that he is deemed to have broken his contract, and setting out the termination payments due to him, if any. The letter will be copied to his department head and Senior Accountant (Payrolls).

49 On this issue, Mr Ganesh submitted in the Appellant's Skeletal Submissions that the collective agreement was part of JC's employment. This however did not address the point that the collective agreement did not specify a need to hold a disciplinary inquiry in cases of absence without leave.

50 As for the PPM, Mr Ganesh could only submit that the trial judge was wrong in concluding that s 5-4 applied independently of s 8-4 without elaborating why the trial judge was wrong. It is clear to me that if a disciplinary inquiry under s 8-4 is necessary even in cases of absence without leave, then s 5-4 is otiose. In my view s 5-4 is independent and separate from s 8-4.

51 I add that the trial judge also found that the evidence demonstrated that no disciplinary inquiry was convened for cases of absence without leave of more than 48 hours. This finding was not challenged.

Whether natural justice requirements applied and whether there was a breach of natural justice

52 On the issue of natural justice, JC was contending that he should have been heard before the

termination letter was sent by SIA. On this issue, the trial judge said:

> 34 In *Ridge v Baldwin* [1964] AC 40, the House of Lords held that the principles of natural justice, and, in particular, the right to be heard prior to dismissal, did not apply in cases of employment contracts. This was applied by the Privy [Council] in *Vasudevan Pillai v The City Council of Singapore* [1968] 2 MLJ 16 and also followed by our Court of Appeal in *Lim Tow Peng v Singapore Bus Services* [1975–1977] SLR 180. Of particular relevance was Choor Singh J's statement at p 188:
>
>> Finally, it was urged that as the appellants had been dismissed for misconduct without being given a hearing, there was a fundamental breach of the rules of natural justice. This submission was also untenable because as pointed out by the Privy Council in *Vasudevan Pillai v The City Council of Singapore* … at p 20, "the relationship of master and servant or employer and employee gives rise to no application of the principle of *audi alteram partem* on dismissal".

53 Mr Ganesh did not dispute the trial judge's analysis of the law. Instead, he submitted that the PPM was the natural consequence of putting into effect the collective agreement and that the PPM did invoke principles of natural justice when it involved principles of inquiry (see para 17 of Appellant's Skeletal Submissions). However, this submission also overlooked the fact that the PPM had s 5-4 for cases of absence without leave which was independent and separate from s 8-4 which dealt with an inquiry.

Whether there was any unfair treatment that could ground a cause of action against SIA

54 This issue was not rigorously pursued by Mr Ganesh.

55 The main thrust of Mr Ganesh's argument on this issue appeared to be that the termination letter was sent to the North Bridge Road address of JC's uncle, where JC once stayed instead of JC's Pasir Ris address where he was living at the time of the termination. This Pasir Ris address was reflected in the documents pertaining to his renovation loan. However, evidence from SIA's Mr Woon was to the effect that JC had not updated his address as formally recorded by SIA.

56 In my view, the burden is on an employee to update his records with his employer and not leave it to his employer to initiate a change in the records without notice from the employee to do so. After all, an employee may be staying at a different address but may want correspondence to be sent to his original address still.

57 In any event, there was no evidence that the sending of the termination letter to the North Bridge Road address was done deliberately to deprive JC of some avenue of recourse.

58 I have already dealt in [22] above with the other point which Mr Ganesh raised *ie* that the result of sending the termination letter to the North Bridge Road address meant that JC eventually received the notice late and was denied his alleged right to appeal under s 14. Accordingly, I need not deal with it again.

59 Given that SIA did not act immediately after two days of absence had lapsed and in the absence of any other evidence, I am of the view that the allegation of unfair treatment has not been made out.

New issue: Whether the termination letter was valid

60 As I have mentioned, the termination letter was dated 5 March 1997. The relevant portion is set out in [3] above. As can be seen, although SIA purported to act on 5 March 1997, it sought to terminate JC's employment with effect from 21 February 1997.

61 In accordance with the views I have expressed, JC's absence in the circumstances allowed SIA to terminate his employment if SIA so wished. However, as I have said, SIA decided not to act immediately but to wait. Bearing in mind that there is no automatic termination even if the conditions under s 13(2) are satisfied, it is for SIA to decide when to terminate. It apparently decided to do so on 5 March 1997 but Mr Ganesh's point was whether SIA could do so retrospectively with effect from 21 February 1997.

62 Indeed, since SIA was acting on the basis that JC was absent without leave from 21 February 1997 and SIA was also relying on s 13(2), the two days of absence without leave would expire on 23 February 1997 only. If Saturday and Sunday were taken into account, it would expire later. So, Mr Ganesh argued that SIA could not have validly terminated JC's employment under s 13(2) with effect from 21 February 1997. There is another argument on this point. Since SIA had waited until 5 March 1997, it would seem that it could only terminate with effect from 5 March 1997. Whether JC should be paid for the days he was absent before 5 March 1997 is another matter.

63 Mr Ganesh argued that JC's pleadings below had raised the issue about the validity of the termination letter as such but a perusal of the same disclosed they had not. Neither was any argument made before the trial judge on this issue.

64 This issue was also not raised in JC's Case dated 30 July 2003 for the appeal. It was raised for the first time in a subsequent Appellant's Submissions, which was undated.

65 Mr Ganesh then argued that JC was not represented by solicitors below. However, while it was true that JC had represented himself at the trial, his pleadings suggest that they had been drafted by solicitors as solicitors' names appear thereon. Furthermore, JC was represented at all material times by Mr Ganesh in the appeal before me. Mr Ganesh's name appears in JC's Case but, as I have mentioned, this issue was still not raised even then. Consequently, Mr Teh said that he was caught by surprise by this issue although he did attempt to present arguments thereon.

66 Although it may be argued that no further evidence is required to determine the validity of the termination letter and that the point is one of law only, I am mindful of the view expressed by Lord Birkenhead LC in *North Staffordshire Railway Company v Edge* [1920] AC 254 where an attempt was made to introduce an argument on the scope of a legislative provision, which argument had not been put forward in the original pleadings or before the trial judge. The attempt to introduce the argument was made before the Court of Appeal but the attempt was rejected. Lord Birkenhead was of the view that the Court of Appeal was right to reject the attempt. He said, at 263 to 264:

> An attempt indeed was made to present the argument to the Court of Appeal, but that tribunal refused, and in my opinion rightly refused, to be influenced by an attempt so belated. I share their view for many reasons, to some of which I attempted to give expression in *Wilson v United Counties Bank*. An attempt was made in the argument to distinguish the doctrines there laid down from those which it was said ought to govern the present case, on the ground that the issue here was a simple point of law of such a kind that the respondent could sustain no possible prejudice by the postponement of its discussion to the appellate stage. It is sufficient to say, in reply to this contention, that there are very few cases of which it can be confidently stated that a failure to raise a relevant contention at the appropriate stage will not prejudice the other litigant. … The appellate system in this country is conducted in relation to certain well-known

principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of appellate tribunals to require that the judgments of the judges in the Courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the Courts below. Decisions of this House have laid it down that in very exceptional cases, and in spite of the considerations above referred to, new matters may be considered by your Lordships: see the judgment of Lord Halsbury in *Sutherland v Thomson* and the judgment of Lord Watson in *Connecticut Fire Insurance Co v Kavanagh*. I have carefully examined the cases upon the subject which have been decided in this House, and my examination of them has led me more and more to the conclusion that such attempts must be vigilantly examined and seldom indulged.

67 I add that part of the passage cited above was also cited with approval by our Court of Appeal in *Feoso (Singapore) Pte Ltd v Faith Maritime Co Ltd* [2003] 3 SLR 556 at 565, although I accept that in that case, our Court of Appeal was of the view that more evidence might well have been required too.

68 JC's appeal before me may or may not be the final avenue of appeal he may avail himself of. Even if it is not the final avenue of appeal available, the observations of Lord Birkenhead are still applicable. I reiterate that there, Lord Birkenhead was of the view that the Court of Appeal in *Edge* was correct in rejecting a fresh attempt to advance a point not taken before the trial judge.

69 So, here, I do not have the benefit of the views of the trial judge. Besides, if the point had been taken much earlier, SIA might have issued another termination letter as a matter of caution.

70 Also, the extent of damages which JC would be entitled to may well be affected if SIA had acted wrongly only in respect of the validity of its termination letter. While Mr Ganesh was no longer seeking damages before me, but only a declaration that the termination was wrongful, such a declaration, if made without qualification, may give rise to more damages being awarded from further litigation, than JC may otherwise be entitled to.

71 In the circumstances, I am of the view that I should and I do reject Mr Ganesh's argument on the validity of the termination letter, not because of a lack of merit on the substantive argument, but because it was not raised or argued below.

72 Mr Ganesh also had a secondary argument *ie* that the termination letter should have referred specifically to s 13(2) and was invalid for not having done so. As this was also not pleaded or argued below, I reject the argument.

73 In the circumstances, I dismiss JC's appeal with costs to be agreed or taxed.

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