

**MALAI NURIDAH SHEIKH MOHAMMAD**

**Appellant**

**AND**

**BRUNEI SHELL PETROLEUM COMPANY SDN BHD  
KEN MARNOCH**

**1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent**

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**(Court of Appeal of Brunei Darussalam)  
(Civil Appeal No. 12 of 2015)**

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Before: Mortimer P, Burrell and Seagroatt JJ A.

**11<sup>th</sup> May 2016**

**Headnote:** *Statement of Claim struck out under order 18 rule 18 RSC by Senior Registrar. Plaintiff's appeal dismissed by judge. Appeal from Judge dismissed. No reasonable cause of action demonstrated in the pleadings.*

Mr. Mohd Shazale bin Haji Mat Salleh (Messrs. Mohd Shazale Salleh, Advocates and Solicitors) for Appellant

Ms. Linda Lee Lian Khing (Messrs. CCW and Partnership) for Respondents

**Cases cited:**

*Dr.A. Dutt v Assunta Hospital [1981] 2 MLJ 304*

**Mortimer P.** (Delivering the judgment of the court)

On 2 November 2015 Steven Chong J dismissed an appeal from the decision of the registrar who had struck out the Statement of Claim in this action on the grounds that it disclosed no reasonable cause of action, it was scandalous, frivolous or vexatious, it tended to prejudice, embarrass or delay the fair trial of the action and that it was otherwise an abuse of the process of the court.

The appellant now appeals against the judge's decision.

**The background**

The appellant plaintiff was an employee of Brunei Shell Petroleum Company (BSP) until her employment was terminated in July 2014 with 3 months salary in lieu of notice under Clause 7 of her contract of employment to which we will refer. She seeks to bring proceedings against her former employer BSP and her superior the 2<sup>nd</sup> defendant, the then Managing Director.

She was employed by BSP from 1 October 1981 under an employment contract of the same date.

Relevantly this provides in clauses 3 and 7:

3. *You will work for us as junior water chemist or in such other positions as we may from time to time direct and in whichever part of the state of Brunei we may require.*
7. *After the expiration of the probationary period, either you or we may terminate your employment at any time by giving not less than three month's notice in writing or alternatively we may terminate your employment at any time without notice upon paying you three month's salary in lieu.*

Having completed her probationary period long ago the appellant continued to work for BSP until on 1 May 2010 she was appointed Human Resources Director. However on 1 May 2012 she was transferred from that post to become '*Special Projects Lead*'. She was very unhappy with her transfer and there was some discussion with the 2<sup>nd</sup> defendant as to whether she should take early retirement. This suggestion was quickly abandoned as it was realised that this was not possible as then she was less than 55 years of age. See the *Retirement Age Order 2010*, to which we will refer.

Despite her reservations the plaintiff accepted the transfer and worked as Special Projects Lead at the same salary for 2 years until her employment was terminated in July 2014.

### ***The termination of her employment***

On 10 July 2014 BSP gave the appellant notice terminating her employment signed by the 2<sup>nd</sup> defendant. She was given 3 months salary in lieu. This notice was given under clause 7 of the employment contract. At the same time the plaintiff was offered an ex gratia payment in return for signing a Settlement Agreement but she refused. It has not been suggested before this court that the notice to terminate the appellant's employment was given other than in accordance with clause 7 of the written contract of employment.

### ***The Statement of Claim***

On 18 May 2015 the plaintiff issued these proceedings claiming damages in respect of this termination of her employment. Her action is founded upon the Statement of Claim and in order to determine whether that pleading discloses a reasonable cause of action a careful consideration of its text is necessary. Considerable passages in this Statement of Claim can properly be described as narrative, rambling, unspecific and irrelevant and fail to comply with the rules which in summary are as follows.

In the Statement of Claim a plaintiff must set out:

1. The relevant facts which the plaintiff intends to prove;
2. The legal duty upon the defendant which these facts show, be it contractual, tortious, legislative or fiduciary; and
3. The consequential damage sustained and claimed and/or the relief claimed.

These allegations must be succinct and clear. At trial the plaintiff is limited to proving and relying upon the allegations in his pleadings and the opposing party is informed of the case he has to meet.

Where, as in this appeal, a defendant seeks to strike out a pleading on the grounds that it discloses no cause of action or is otherwise an abuse of process under order 18 rule 18 RSC the approach is well known and sufficiently set out in Steven Chong J's excellent judgment. Under this approach the court is always reluctant to strike out a claim and if an omission in the pleading is remedial by amendment, the court will seek to allow it.

Mr Shazale, who appears for the appellant and who did not draft the Statement of Claim,, has abandoned any contention that the Statement of Claim demonstrates a reasonable cause of action of constructive dismissal on 1 May 2012 or that it demonstrates any action on defamation for the manner of dismissal.

He contends that the Statement of Claim discloses an action for unfair dismissal which the court has jurisdiction to consider under the Employment Order 2009 and an action on the grounds that her dismissal was on the grounds of her age in breach of the Retirement Age Order 2010 whether or not notice complied with the written contract.

### ***The allegations in the pleading***

We turn to consider the pleading. It is to be noted that the Statement of Claim makes no specific allegation that the appellant's employment was unfairly or unjustly brought to an end. Further, there is no reference to any employment contract. Her written contract is completely ignored. Further, there is no reference to the Employment Order still less any duty under it or breach of it. At most in this respect there are allegations of a failure to offer a suitable financial package; that the notice was "*tantamount to enforced retirement, which was against the plaintiff's own wishes to retire at the retirement age of 60 years*"; and that there was a failure to follow the grievance procedure. Whereas there are allegations that this amounted to a breach of the rules of natural justice and discrimination there is no allegation that any of these matters constituted a breach of a term of her employment contract be it express or implied. No reasonable cause of action of unjust or unfair dismissal is demonstrated in the pleading.

As for the suggested breach of the Retirement Age Order 2010, there is no recital of any facts from which the court could infer that the reason for the termination of her employment was on the grounds of her age. The nearest the pleading gets to such an allegation is that the notice under Cl. 7 was tantamount to enforced retirement, and an allegation that her early retirement was discussed and rejected in 2012. There is no allegation that the reason for giving the notice was her age and no reference whatsoever to the Retirement Age Order 2010. There are allegations in the pleading of differences with her superior, the 2<sup>nd</sup> defendant, as well as failures to carry out some of his instructions. These at least indicate some possible motive for BSP the employer to give her notice under the provisions of the written contract of employment. Again no reasonable cause of action on age grounds is disclosed in the pleading.

Both decisions below can be readily supported on this basis. However, we heard Mr Shazale's submissions under each of the above orders to determine whether there is any possibility of these deficiencies in the pleading being remedied by amendment. Mr Shazale has not suggested or applied for any amendment.

We now consider his submissions under the Employment Order 2009 and the Retirement Age Order 2010.

### ***The Employment Order 2009***

Mr Shazale contends that the court has jurisdiction to review the legality, fairness or justice of the dismissal under section 26 (2) of the above order even if the notice is given in compliance with the written contract of employment.

Section 26 provides:

26. (1) *an employer may after due enquiry 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 downgrade the employee; or*  
 (b) *instantly suspend him from work without payment of salary for a period not exceeding one week.*
- (2) *notwithstanding subsection (1) when 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.*

He founds this submission that the court may review the termination on section 20 (1) of the Malaysian Industrial Relations Act which provides:

20. (1) *where a workmen who is not a member of a trade union of workmen 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 Director-General to be reinstated in his former employment; ...*

His argument continues:

- a) that it is arguable that the appellant was an 'employee' within the meaning of section 2 of the Brunei Order as when she had been transferred from the human relations department she did not remain "in a managerial, executive or confidential position"; (See section 2 of the Order.)
- b) that the Malaysian Federal Court held under Section 20 (1) of the Malaysian legislation the Malaysian Industrial Court had jurisdiction to review a dismissal under a similar term in a contract of employment and grant reinstatement or compensation. See *Dr.A. Dutt v Assunta Hospital [1981] 2 MLJ 304.*
- c) That having regard to this persuasive Malaysian authority the appellant has an arguable cause of action that under 26 (2) the Brunei court has similar jurisdiction to review her dismissal.

However, reliance upon this Malaysian legislation and the above Federal Court decision as a guide to the interpretation of the Brunei Order is wrong and misleading.

In *Dr Dutt's* case the Federal Court was considering an application for Certiorari (judicial review) to bring up for review the decision of the Malaysian Industrial Court. As with judicial review the only issues were whether the orders of the Industrial Court were made within its jurisdiction and were legal.

The Malaysian Industrial Court has powers under which it may interfere with the freedom of contract and used them in this case. Section 30 of the Malaysian Industrial Courts Act, which is cited in *Dr Dutt's* case, provides:

- 30(1) the court shall have power in relation to a trades dispute referred to it or in relation to a reference to it under section 20 (3) to make an award (including an interim award) relating to all or any of the issues in dispute.*
- (5) the court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.*
- (6) in making its award the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of a trades dispute or in the matter of the reference to it under section 20 (3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trades dispute or the reference to it under section 20 (3).*

In Malaysia the Director General has power to refer the matter to the Industrial Court and he did so. The Industrial Court decided that the doctor was a “workman” within the meaning of section 20(1) of the local legislation and that the dispute was an industrial dispute. In the application for Certiorari the Federal Court decided that the Industrial Court’s decisions were made within its jurisdiction and according to law. Once the Industrial Court had jurisdiction it had the general power to review a termination otherwise valid under a contract of employment. See Section 30 of the Malaysian Industrial Court Act to which we have referred.

In this jurisdiction there is no Industrial Court and there is no legislative provision granting general discretionary powers to interfere with the freedom of employment contracts on the grounds of social justice. The Brunei court has no jurisdiction or general discretion similar to the Malaysian Industrial Court under section 26 (1) of the Employment Order.

Leaving aside the likelihood that in any event the Employment Order does not apply to the appellant’s former employment, as she almost certainly remained in a ‘managerial or executive’ position under section 2 after her transfer, Mr Shazale’s submission on section 26 (2) of the Employment Order 2109 fails. No cause of action under the Employment Order is demonstrated.

### ***The Retirement Age Order 2010***

The appellant claims that the real reason for the termination of her employment was because of her age. The foundation for this allegation appears to be the discussion in

July 2012, to which we have referred, as to whether she should take early retirement. As she was less than 55 years old at that time the discussion was quickly abandoned.

The Retirement Age Order 2010 applies to the appellant's contract of employment (see section 2 (1)) and further provides:

4. (1) *Notwithstanding anything in any other written law, contract of service or collective agreement, the retirement age of an employee shall be not less than 60 years.*
- (2) *No employer shall dismiss on the ground of age any employee who is below the age of 60 years.*
- (3) *Any employer who contravenes subsection (2) is guilty of an offence and is liable on conviction to a fine not exceeding.....*

***Invalidity of term of contract of service***

5. *Any term of a contract of service or collective agreement made before, on or after first January, 2010 which provides for retirement age which is less than 60 years shall be void to the extent that it is so less favourable.*

***Remedies for unlawful dismissal on grounds of age***

7. (1) *Where any employee below the age of 60 years considers that he has been unlawfully dismissed on the ground of age, he may, within one month of the dismissal, make representations in writing to the Minister to be reinstated in his former employment.*

The further subsections of section 7 provide procedural rules for the representations to the Minister and sanctions for non-compliance with his decision and subsection (6) provides that a direction of the Minister shall operate as a bar to any action for damages by the employee in respect of unlawful dismissal on the grounds of age.

This legislation has the effect of outlawing any term in a contract of employment which provides for retirement below the age of 60, and any dismissal of an employee under the age of 60 which is shown to be on the grounds of his age. There is no provision in the appellant's contract providing for retirement below the age of 60 so the legislation only becomes relevant if the termination of the appellant's employment was on the grounds of age. The contract of employment is valid. Under it the appellant's employment could be terminated by BSP on any ground or no ground provided the termination is not shown to be on the grounds of age.

Of course facts must be alleged in the Statement of Claim which if proved will establish that the appellant's termination was on the ground of age in order to establish a cause of action. As we have already said no such facts are alleged and Mr Shazale's submissions under the Retirement Age Order fail.

In the circumstances it is not necessary to consider whether the only remedy open to the appellant under the Retirement Age Order is an application to the Minister under section 7(1).

The consequences that even if it were open to the appellant to take proceedings under the Retirement Age Order she has cannot establish the necessary facts.

***Conclusion***

For the reasons we have given no reasonable cause of action is demonstrated in the Statement of Claim. Further, there is no indication that the defective pleading can be remedied by amendment for which there has been no application. The pleading is a mere catalogue of mostly irrelevant general complaints. It is an abuse of process. It was rightly struck out by the registrar and the judge rightly dismissed the appeal against the registrar's order.

For these reasons we dismiss this appeal.

***Final Order***

The appellant to pay the costs of the appeal and the costs of the 1<sup>st</sup> Respondent's notice. The costs to be taxed if not agreed.

**Mortimer, P.**

**Burrell, J.A**

**Seagroatt, J.A**