STANDARD CHARTERED FINANCE (BRUNEI) BERHAD … **Appellant**

AND

LOH NYUK CHOI … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 8 of 2011)

Before: Mortimer P, Davies and Leonard JJ A.
14th & 19th November, 2011.

Ms. Elaiza Hanum Merican binti Idris Merican of M/S Abraham Davidson & Co for the Appellant.
Mr Rudi Lee Kim Boon of M/S Fathan, Rudi Lee, Annie Kon & Associates for the Respondent.

Cases cited in the Judgment:

Gunton v I.B. of Richmond upon Thames [1980] 3 All ER 577
Loh Nyuk Choi v Standard Chartered Finance (Brunei) Berhad. Civil Appeal No 17 of 2008
Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23; [1988] AC 20; [1997] 3 All ER 1; [1997] IRLR 462; [1997] 3 WLR 95; [1997]ICR 606 (12th June 1997).

Leonard, J.A.

In *Loh Nyuk Choi v Standard Chartered Finance (Brunei) Berhad* Civil Appeal No. 17 of 2008 this court held that Standard Chartered Finance (the appellant in the present appeal) was liable to Loh Nyuk Choi (the respondent in the present appeal) for damages for wrongful dismissal. Judgment was entered accordingly and the case was remitted to the court below for an assessment of damages. This court observed that the assessment would not be easy and would depend upon the available evidence. That assessment was carried out by the Senior Registrar and the Appellant now appeals against the decision. In addition, the respondent to the appeal has filed a notice seeking to vary the judgment.

The Senior Registrar awarded

a. The sum of BND28, 230.60 being 6 months' remuneration. This was later reduced by BND23, 079.88, a sum that had been paid to the Respondent on his dismissal.
b. The sum of BND125,460 being the amount of retrenchment compensation that the Respondent would have received and

c. Interest on the damages awarded at the rate of 3% per annum from the date of termination of the Respondent's employment (11 September 2000) to the date of judgment by the trial judge on the issue of liability (29 July 2008) and thereafter at the rate of 6% per annum to date of full payment.

There is no dispute as to the arithmetic of the award. The appellant asks this court to find that the Senior Registrar erred in finding that a reasonable period of assistance would on the balance of probability have been 6 months. It says that the Senior Registrar did not give sufficient weight to certain evidence led for the Appellant and that her decision was against the weight of certain of the Respondent's evidence. There is complaint that undue weight was given to the evidence of the Respondent's long unblemished record of employment. It is further contended that the Senior Registrar erroneously construed part of the judgment of this court in Civil Appeal No.17 of 2008 (at paragraphs 42 and 49) as supporting a finding that 6 months would have been a reasonable period.

The passages in question read:

> *"42. We recall the relevant background. The bank chose to dismiss him for poor performance and may have taken into account also the misconduct alleged. This was the dismissal of an employee who had served the bank and its predecessor satisfactorily with unblemished conduct for twenty years. This was followed by a failure to achieve a target set by the bank in deteriorating economic times over the relatively short period of six months None of his colleagues doing the same task reached his or her target either, In the circumstances it would have been difficult for the bank to conclude that the plaintiff's problems on which they terminated his employment were irremediable.*
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> *"49. When an employer is dismissing a longstanding employee for cause, as in this case, rather than terminating his employment out of commercial necessity there are few circumstances in which it is more important for the employer to fulfil his obligations. We are satisfied that there was no reasonable or proper cause for the bank's conduct in the manner in which the plaintiff was dismissed. (We) are also satisfied that the conduct we have described was calculated to destroy or seriously damage the relationship of trust and confidence. It undoubtedly did so in this case."*

We can find nothing in the Senior Registrar's judgment to warrant a finding that she construed erroneously what this court had said. We note that in setting out her conclusions, the Senior Registrar says:

> *"In arriving at my decision, I have taken into account all evidence and submissions made by the parties. I must thank both parties for handing in excellent written submissions which have assisted this court tremendously."*

The notes of evidence, the written submissions that were before the Senior Registrar and her judgment indicate to us that she was aware of and gave due consideration to all the evidence and arguments. There was evidence upon which it was open to her to arrive at the conclusion she reached. An appellant in such circumstances faces an uphill task if he seeks to overturn findings of fact.

The Respondent likewise invites this court to interfere with the Senior Registrar's decision as will be seen below.

It is the appellant's case that the Senior Registrar should not have taken 6 months as a reasonable period of assistance because the guidelines provided for a maximum of 6 months whereas there was evidence, in particular that of DW2 and of the respondent himself, which would have supported a finding that three months would have been reasonable. DW2 was giving evidence long after the event about matters of which she had no direct knowledge. She was taking her knowledge of the policy of the parent company, Standard Chartered Bank, by which she was employed and attempting to relate it back to the material time. Her evidence as to what the managers in the appellant company, a separate entity, might have done in relation to the respondent was pure speculation. Ms. Mericam, whilst suggesting that in view of the circumstances three months would have been enough and that undue weight had been given to the respondent's long unblemished record of employment, contended that the question whether or not the assistance would have borne fruit within 3 months was not a question that needed to be considered. With regard to the latter contention she placed reliance on the case of *Gunton v I.B. of Richmond upon Thames* [1980] 3 All ER 577. It seems to us that the case has no relevance to the present one because it relates to the need to follow certain steps in disciplinary proceedings before a dismissal can be effected. It is quite different from the procedure with which we are concerned which is designed to help employees to improve so that they may be retained in employment. Ms. Merican maintained that it would not matter if after 3 months the respondent had come up to a satisfactory standard because the appellant would have dismissed him in any event. She maintained that on the authority of *Gunton* the appellant was entitled to give 3 months' notice of termination of the contract whether or not the respondent had come up to scratch after 3 months. The implication must be that the court should assume that the appellant would have given lip service to the guidelines but that the whole procedure would have been a sham. We are not prepared to make any such assumption. It must be assumed that in following the guidelines the appellant would have acted in good faith having regard to the implied obligation of mutual trust and confidence.

Under the Guidelines issued to the appellant's managers, assistance for a reasonable period should be given to a poor performer with a view to improving his performance. They provide for a usual maximum period of 6 months for such assistance to be afforded. At any stage the procedure of assessment at intervals may be extended, at the discretion of management, if this is considered likely to enhance the prospects of the member of staff raising his/her performance to the required standard. There is also provision for further time to be given, exceptionally, after six months, and a further review date set. The Guidelines stress that *'...the primary objective is to "manage up" poor performance to a satisfactory level and that staff must be given encouragement and assistance to improve.'*

On 7 February 2001 the appellant carried out a retrenchment scheme under which all its employees received a payment of compensation. Had the respondent still been in the Appellant's employ on that date he would have been a beneficiary of the scheme. The Appellant contended below that three months would have been a sufficient monitoring period but the Senior Registrar found on the evidence that a reasonable period in the present case would have been 6 months, running from the date of dismissal on 11 September 2000 to March 2001. That meant that the Respondent would have been a beneficiary of the retrenchment scheme, as indeed he would have been had the period been 5 months.

The crucial question before the Senior Registrar was how long a period of assistance should have been given to the respondent. If the managers involved had proceeded in good faith, as they were bound to do, setting an agreed target that was not impossible to achieve and giving all reasonable assistance to the Respondent, it seems to us that it cannot be assumed that after three months a manager with an exemplary record of loyalty and achievement over 20 years would necessarily have been found unfit for further employment and would have there and then been given three months' notice without any further time for improvement being allowed. Had he come up to standard, it was open to the Senior Registrar to find it more likely than not that he would have remained in employment until the exercise in retrenchment took place. We find ourselves unable to say that the Senior Registrar's selection of 6 months can be faulted.

Mr Rudi Lee for the respondent, whilst supporting the Senior Registrar's finding that 6 months would have been a reasonable period of assistance, maintained a claim that had been dismissed by the Senior Registrar. That was for a sum of $777,902.40 for loss of earnings up to the respondent's normal retirement date. This involved an assumption that the respondent's employment would have continued. Mr Lee acknowledged that he faced some stumbling blocks. The first was that the appellant ceased operations in early 2000 and its business was taken over by the Standard Chartered Bank. He acknowledged that the retrenchment was a basis for the Senor Registrar's finding that the damage was too remote. Mr Lee suggested that the respondent might have been taken on by the Standard Chartered Bank, which had employed several of the respondent's former colleagues. The next stumbling block was that the Standard Chartered Bank, though it was the parent company of the appellant, (Mr Lee said that it was the holding company) was a separate legal entity. It is not surprising that the Senior Registrar was not prepared to assume that the respondent would be taken on by the Standard Chartered Bank and would remain in its employ until retirement.

Mr Lee also referred to a possible implied diminution of the respondent's employment prospects as a result of his dismissal, bearing in mind the fact that Brunei is a small place. He conceded that there was no evidence of such diminution but submitted that some compensation ought to be given to him.. In support of the proposition he referred to *Malik v Bank of Credit; Mahmud v Bank of Credit {1997] UKHL 23; [1988] AC 20; [1997] 3 All ER 1; [1997] IRLR 462; [1997] 3 WLR 95; [1997] ICR 606 (12th June 1997).* He quoted Lord Steyn's remark that conduct in breach of the trust and confidence term might diminish the employee's attractiveness to future employers. With regard to the sum claimed Mr Lee accepted that it took no account of the exigencies of life and did not allow for early payment. Nor did it appear to allow anything for the earnings from subsequent employment. Mr Lee described his figure as a starting point. Whilst it is true that the respondent had a period of unemployment and went bankrupt on his own application and that when he did get a job it was inferior to the one he had held before his dismissal, we know of no evidence to show that this was attributable to anything other than the prevailing economic circumstances. We find no ground for interfering in the Senior Registrar's decision to decline to make the award sought by Mr Lee.

As to the award of interest on the judgment sum, that was a matter for the Senior Registrar's discretion and of course such discretion must be exercised judicially. There is nothing in the judgment to show why the Senior Registrar selected 3% as the appropriate rate up to the date of judgment on liability, namely 28 July 2008. According Ms. Merican, however, she did argue in her written submissions for a rate of 3% in view of the long delay in the proceedings and asked the Senior Registrar to consider the court's record in relation to delay. The record

shows that she duly asked in her oral submission for that rate and it is common ground that Mr Lee said nothing in opposition. The writ was not issued until 2003 and the case has taken until late 2011 to reach its conclusion. It is true to say that the claim upon which the respondent eventually succeeded was only formulated at very late stage. There is no ground for a finding that the Senior Registrar failed to exercise her discretion judicially and no ground therefore for interference by this court with her decision.

The appeal is dismissed and the respondent's application to vary the judgment is dismissed. There will be an order that unless within three days of the date of this judgment either party makes application for some other order, the respondent's costs of the appeal be paid by the appellant and that the appellant's costs of the respondent's application to vary the Senior Registrar's order be paid by the respondent.

Mortimer, P.

Davies, J.A. **Leonard, J.A.**