

EMPLOYMENT LAW:

INDUSTRIAL COURT REINFORCES THE LAW ON FRUSTRATION OF CONTRACT DUE TO EMPLOYEE'S ABSENCE FROM WORK



INTRODUCTION Our Partner, Wong Keat Ching and Associate, Syazwani Suhaimy succeeded in representing Tenaga Nasional Berhad ("the Company") in an unfair dismissal claim by Sathasivam A/L Muthusamy ("the Claimant") whose employment contract was terminated by way of frustration of contract after the Claimant was absent from work for more than 2 months as he was held in custody pending the trial of the criminal charges against him.

BACKGROUND FACTS The Claimant was employed as Auger Crane Operator at TNB Raub. The Claimant was arrested and remanded by the police on 31.07.2012. He was subsequently charged in the Raub Magistrates Court under Section 15(1) the Dangerous Drugs Act 1952 ("the DDA") and Raub Sessions Court under Section 39A(2) of the DDA.

The Company was informed by the police that the Claimant was detained without bail at the Penor Prison, Kuantan and his trial date was indefinite.

After more than 2 months of absence from work, by a letter dated 10.10.2012, the Company informed the Claimant that given his detention at the Penor Prison and his inability to report for work to perform his duty as Auger Crane Operator, his contract of employment was deemed frustrated and his termination was backdated to the date he was first arrested and absent from work on 31.07.2012 ("the Letter of Termination").

The Claimant was eventually acquitted of all the criminal charges levelled against him by the Raub Magistrate's Court on 05.07.2013 and the Raub Sessions' Court on 28.10.2013, respectively. After his release from prison about 15 months later, the Claimant filed his claim for reinstatement to his former position in the Company.

THE ISSUE The issue before the Industrial Court in this case is, whether the Claimant's contract of employment with the Company was deemed terminated on the ground of frustration when the Claimant was arrested and detained at the Penor Prison.

The Company contended that the Claimant was not able to perform his duties as an Auger Crane Operator as required under his employment contract with the Company because of the aforesaid arrest and detention at the Penor Prison.

The Claimant contended that it was unfair for the Company to unilaterally terminate his services without due process effective from 31.07.2012 and that his absence from work was not deliberate but due to his arrest which he was later found not guilty by the Criminal Courts.

DECISION OF THE INDUSTRIAL COURT

Unable to perform the agreed work The Industrial Court held that it is clear that the law allows the employer to frustrate the contract of employment with the employee when the employee is not able to perform the agreed work because he has been detained for a criminal offence.

The Industrial Court held that the temporary unavailability of a workman caused by his arrest and/or detention by the police will not of itself frustrate a contract of employment. It will only have this effect where the arrest and/or detention renders the **resumption of performance of the contract within a reasonable time a practical impossibility**.

In this case the Company made efforts to seek information from the police, but the Company still could not know when the Claimant would be tried for his criminal cases nor when, if at all, he would be released from detention. In the circumstances of this case, the Industrial Court held that no reasonable employer would have been expected to continue with the Claimant's services. **The Company could not be expected to continue waiting indefinitely for the Claimant's return to service, not knowing if he would ever do so.**

Just cause and excuse The Claimant argued that he was dismissed without due process and the dismissal was done in breach of natural justice. The Claimant contended that he was not given any show cause letter and the opportunity to be heard. The Industrial Court held that the approach taken in relation to the right to terminate the services of an employee in the case of arrest or detention from the perspective of industrial law is very different from the common law wrongful dismissal.

The Industrial Court held that in this case, when the termination is due to the continued absence of the workman on account of imprisonment or detention, it is doubtful what purpose would be served by a formal show cause letter being delivered to him and what conceivable answer he could give thereto especially when the arrest and detention were not attributable to the employer. Therefore, the dismissal cannot be set aside purportedly on the ground that the principles of natural justice have been violated.

The Industrial Court held that it is an established principle in industrial jurisprudence that in cases of imprisonment or detention, the workers are still liable to apply for leave. In this case, there is no evidence that the Claimant and/or the Union had at any material time applied for leave of absence from the Company when the Claimant was detained at the Penor Prison for approximately 15 months.

Therefore, the action of the Company in issuing the Letter of Termination to the Claimant after more than 2 months was justified and lawful.

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Zul Rafique & partners
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