INDUSTRIAL COURT OF MALAYSIA

[CASE NO: 22(27)/4-1580/12]

BETWEEN

ALI SALIH KHALAF

AND

TAJ MAHAL HOTEL

AWARD NO. 245 OF 2014

BEFORE	**:**	**Y.A. DATO' MARY SHAKILA G. AZARIAH - CHAIRMAN (Sitting Alone)**
VENUE	**:**	Industrial Court, Kuala Lumpur
DATE OF REFERENCE	**:**	25 September 2012
DATES OF MENTION	**:**	26 November 2012, 11 January 2013, 14 February 2013, 17 June 2013 and 30 October 2013
DATES OF HEARING	**:**	17 May 2013 and 30 September 2013
DATE OF ORAL SUBMISSIONS	**:**	18 December 2013
REPRESENTATION	**:**	*For the claimant - V K Raj; M/s P Kuppusamy & Co* *For the company - Absent*

REFERENCES:

This case is a reference under Section 20(3) of the Industrial Relations Act 1967, arising from the dismissal of **Ali Salih Khalaf** (hereinafter referred to as "the Claimant") by **Taj Mahal Hotel** (hereinafter referred to as "the Hotel") on 12 January 2011.

AWARD

This reference stems from the dismissal of Ali Salih Khalaf ("the Claimant") by Taj Mahal Hotel ("the Hotel") on 12 January 2011.

Brief Facts

The Claimant, an UNHCR refugee, was employed by the Taj Mahal Hotel (the said "Hotel") sometime August/September 2010 as a receptionist. On 23 December 2010 whilst the Claimant was on duty a man walked in asking to see a guest at room 6. The man had told the Claimant that his girlfriend was also in the said room with the lodger. The Claimant avers that he told the man that he had not seen any woman going up to the said room no. 6. The man he said walked away but returned and went up straight to room 6. The room door was opened by a woman and the Claimant contends that he heard the parties shouting at each other. The Claimant avers that he walked up to the room and the man opened the room door for him when he rapped at the door and he asked the man to not shout as it disturbs the other lodgers. He averred that all the occupants then left the room and

the lodgers checked out at about 6.00 am on 24 December 2010. The Claimant further contends that at about 6.30 am 15 men came into the hotel asking to see the occupants of room 6. The Claimant answered them saying that they had checked out. The Claimant avers that he was attacked by some of these men physically with a metal pipe and a belt. He said that another stabbed him with a small switch blade knife. The Claimant called the hotel's proprietor a Pakistani and informed him of what had happened. The Claimant lodged his report with the police at the Tun H.S. Lee Police Station later that morning and then proceeded to seek treatment at Hospital Kuala Lumpur. He returned to the hotel later that day. The Claimant avers that a few days later the proprietor of the Hotel handed the Claimant his salary for the month of December and told him that his last day of employment with them. The Claimant avers that he was unjustly dismissed and that his dismissal was capricious and arbitrary.

On the date fixed for Hearing that is 30 September 2013, though served with the Court's notice informing it of the said Hearing date the Hotel's officers did not attend Court. The Court proceeded to hear the case *ex-parte*. This the Court felt it was empowered to do by virtue of Section 29(d) and 29(g) of the Industrial Relations Act 1967.

The law on dismissal have evolved over the years through case-law. In the Federal Court case *of Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Anor appeal* [1995] 3 CLJ 344 at page 352 held that:

> ***"On the authorities we were of the view that the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act (unless otherwise lawfully provided by the terms of the reference) is to determine whether the misconduct or irregularities complained of by the management as grounds for dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal".***

The Claimant's testimony in Court about his services with the Hotel and the events that led to his dismissal in December 2010 was in accordance with his pleaded case. Since the Hotel or its witnesses were absent in Court during the Hearing the important aspects of the Claimant's evidence remains incontrovertible and thus unchallenged by any sworn evidence by the Hotel.

The Court heard submissions from the Claimant's Counsel on why the Claimant notwithstanding that he is a United Nations High Commission For Refugees (UNHCR) refugee in Malaysia had a right of employment and could seek relief for unjust dismissal under the Industrial Relations Act 1967. The Claimant's Counsel drew the Court's attention to the case of *Dr. A Dutt v. Assunta Hospital* [1981] 1 MLJ 304 where it was held that whether the Claimant was a workman under the Industrial Relations Act 1967 was a question of mixed law and fact. It was submitted that section 2 of the Industrial Relations Act 1967 makes reference to "any person" and that it is wide enough to cover a refugee like the Claimant. His Counsel submitted that section 2 of the Industrial

Relations Act 1967 does not exclude a refugee under UNHCR by its definition of a workman. Reference was also made to section 2 of the Human Rights Commission of Malaysia Act 1999 wherein human rights was defined as fundamental liberties as enshrined in Part 11 of the Federal Constitution. Article 5(1) of the Federal Constitution provides that no person shall be deprived of his life or personal liberty save an accordance with the law.

The Claimant's Counsel drew the Court's attention to the definition of “life” as defined by the Federal Court in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 where it was held that life appearing in Article 5(1) does not refer to mere existence but it incorporates all those facets that are an integral part of life itself and those matters that go to form the quality of life. It held that of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. The Claimant's Counsel further submitted that Article 8(1) reads that all persons are equal before the law and entitled to equal protection of the law. Hence he concluded that the Claimant

notwithstanding his status as a UNHCR refugee was able to enjoy the protection against an unlawful dismissal under section 20 of the Industrial Relations Act 1967. It was his submission that all these authorities taken together shows that the Claimant was a workman under the Industrial Relations Act 1967. He concluded his submissions by citing the dicta from the case of *Dr. A. Dutt (supra)* where at page 312 Chang Min Tat FJ citing the judgment of Mukherjee J, in *Bharat Bank Limited Delhi v. Employees of Bharat Bank Ltd. Delhi AIR* [1950] SC 304 had said that in settling disputes between employers and workmen the function of the tribunal is not confined to administration of justice in accordance with law. It was held that it can confer rights and privileges on either party which it considers reasonable and proper though they may not be within the terms of any existing agreement. It was further held inter alia that it can create new rights and obligations between them which it considers essential for the keeping of industrial peace.

The Court found the Claimant's Counsel's submission very enlightening and commends him for his efforts. As we are aware in the year 2013 (mid) the Government of Malaysia through the Ministry of Home Affairs has made work legal for refugees and all asylum seekers in Malaysia. Today such refugees and asylum seekers have a legal recourse if they get caught in any exploitative situations with employers. This move by the Government is lauded as a humanitarian solution to a humanitarian problem that is most welcomed as it takes account of social realities on the ground which are better tackled than ignored. Previously however Malaysia did not recognize the rights of refugees to have the right to work. But does that mean that such refugees as in the case of the Claimant could not seek gainful employment and if they did could not avail themselves to the protection of the Employment Act 1955 and Industrial Relations Act 1967 if they were unlawfully dismissed? My answer is yes, they are protected and can seek the protection and claim to be reinstated under the Industrial Relations Act 1967. I give my reasons for my answer being in the affirmative.

The Court agrees with the sentiments that no persons no human being should ever be illegal. Of the 2 categories of migrant workers in our country namely documented and undocumented, the latter category, that is those without work permits, passes or visas that is required by law before a migrant worker can work, is nevertheless equal before the law as Article 8 of the Federal Constitution uses the word “persons” and not “citizen”. Therefore rights guaranteed by it is equally extended to all persons including migrant workers of both categories. As submitted by the Claimant's Counsel this equality is also reflected in the Employment Act 1955 which applies to all workers regardless of whether the person is a local or foreign worker (documented or otherwise) in the country. Section 2 of the Employment Act 1955 defines an “workman” as any person ... employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute ... In the First Schedule Item 1 further describes the category of workers as “any persons irrespective of his occupation who has entered into a contract of service with an employer...” and, in Item 2 it describes the other

category of workers covered by the Act. The Industrial Relations Act 1967 applies to all workers and all migrant workers, that is, both documented and undocumented workers have a right to pursue their rights if infringed in the Industrial Court. The Claimant being a UNHCR refugee falls under the second category of migrant worker *viz* undocumented, and on the facts was employed to work for the Hotel Taj Mahal. At least his testimony to that effect was unchallenged as the Hotel was absent during the Hearing. Hence he has a right by virtue of the laws of Malaysia to file a claim against the Hotel *vide* section 20 of the Industrial Relations Act 1967 (the preamble of which states that it is an ACT to provide for the regulation of the relations between employers and workmen... and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom) through the Industrial Relations Department for unjust dismissal. In any event there is no arguments to counter this line of argument that has been put forward by the Claimant's Counsel.

Having perused the facts and evidence it is the considered view of the Court that the Claimant a workman for the purposes of the Industrial Relations Act 1967 was dismissed on the facts before the Court without just cause or excuse.

Relief

The Company has dismissed the Claimant without just cause or excuse. The Court does not think that reinstatement would be a suitable remedy given the facts of this case. As such the Court makes the following orders:

(1) Compensation *in lieu* of Reinstatement

The Court is unable to make an order that the Hotel pays the Claimant any compensation as he as not completed a year in service.

(2) Backwages

RM1,000 x 24 months = RM24,000.00

The Court is aware that it is required to rescale and reduce the backwages by the post-dismissal earnings of the Claimant. No evidence was adduced by the Claimant in so far as his post-dismissal earnings are concerned. Nevertheless the Court deems it appropriate to make a deduction of 5%.

RM24,000.00 x 95% = **RM22,800.00**

Final Order

The Company is ordered to pay the Claimant the sum of RM22,800.00 to the Claimant, less any statutory deductions, if any, *vide* his Solicitors within 30 days from the date hereof.

HANDED DOWN AND DATED THIS 13 DAY OF FEBRUARY 2014

(DATO' MARY SHAKILA G. AZARIAH)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR