A Survey on Employment Law in Petrochemical Industry in Malaysia

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ARTICLE INFO
Article history:
Received 25 April 2014
Received in revised form 8 May 2014
Accepted 20 May 2014
Available online 17 June 2014

Keywords:
Petrochemical Industry, Employment Law, Safety, PETRONAS, Industrial Accidents

ABSTRACT
Since 1990s the Petrochemical industry in Malaysia has developed a lot. The petrochemical industry is now playing very important role in economic growth of this country. The main purpose of this research is to clarify the rules and regulations which are mentioned in Malaysian Labor Law 1955 and Occupational and Safety Law (1994), in order to protect the safety of workforce in petrochemical companies in Malaysia. The study was conducted in PETRONAS in Kuala Lumpur. The employment rules inside the company are analyzed to understand beside the Malaysian law, how the rules and regulations of the company support workforce. The main instrument to collect the data is interviews with some employees in the organization.

INTRODUCTION

1.1 Petrochemical Industry in Malaysia:
The petrochemical industry in Malaysia is reinforced by its government of and PETRONAS. PETRONAS and the local Company both are decided to make Malaysian petrochemical industry focal point in the region and base in ASEAN market.

PETRONAS has established with the intention of being a global axis in oil and gas industry with bigger overlap in international projects as well as following to commence on lately local projects. The strategies which are applied in PETRONAS by the Government are, decisive and pliable because they are trying to attract foreign investment directly to the industry.

The development of the industry is owed by various positive choices in the industry such as the availability of feedstock, good foundation and supporting industries, cost competitiveness as well as strategic site in ASEAN.

The requirement for synthetic rubber needed the expansion of an extensive technology for generating benzene, styrene, butylene, butadiene, and acrylonitrile (Samuel et al., 2013). All fundamental products of methane to the aromatics and petrochemical intermediates which are transposed overseas largely, at the moment are accessible available for growth of downstream products like concentration chemicals ("Malaysian Petrochemical Associations," 2013).

All these elements help to enhance in attendance of multinational companies that keeps going to be crucial in easy available to the Malaysian Oil and Gas industry to the international market. The top three Leading Petrochemical Companies in Malaysia are: PETRONAS Shell, ExxonMobil(“List of Oil Companies in Malaysia,” 2013).

1.2 PETRONAS:
The Company was established on 17th August 1974, when the national oil company of Malaysia was authorized with 100% proprietorship and control over the petroleum resources of the country. It has grown since merely being the manager and regulator of Malaysia’s upstream sector into a fully integrated oil and gas corporation, the Company has ranked amongst Fortune glob the five hundred biggest corporations in the world (Petronas, 1999). Much of the Company success is because of strong competence in making balance between state enterprise entity and a mature state organization.

As a state-enterprise essence, the Organization is managing effectively the oil and gas resources of Malaysia, for creating and adds value to this national property and so in this situation the sustainable development would be warranted for the petroleum industry of the country. Qua a business entity, PETRONAS...
is doing its operations in competitive and commercially partial manner to battle productively with turbulence global business environment, while enlarging is returning to its shareholders. PETRONAS in 1990s in strategic globalization had planned to increase crude oil and gas assets based on its very good experience in unified petroleum action by adding value to the nucleus of the business and making new challenges for the young workers ("PETRONAS," 2013)

1.3 Health, Safety and Environment (HSE) in PETRONAS:
Safety is always a key area in petrochemical industry. Since the accident in Gulf of Mexico in 2010, the industry tries to monitor and review any procedures and process in order to minimize any risk in the industry.

PETRONAS is entrusted to provide the largest safety, security and health standard. The company is boosting HSE inside the organization by remaking of Group health and safety and Environment Division (GHSED) to empower the business to have more responsibility. GHSED is also providing a model to strengthen the compulsory HSE standard to be performed Group wide (Atleson, 1974).

The important goals of HSE implementation in PETRONAS are straightforward, according to HSE, wants to reduce the risks which are related to the job. The Company keeps stability in performance of HSE standards and necessity by certifying the integrity of asset and describing the safeguards in a place are complete factors of keeping safe operating environment. PETRONAS is continuing to review and monitor the totality and validity of the company’s asset via Operational Excellence and Process Safety initiatives ("Health and Safety," 2013).

1.4 Shell in Malaysia:
Today, Shell is the petroleum leader in Malaysian market provides 1/3 of Peninsular Malaysia and 50% of demand market of Sabah and Sarawak. Based on the contributing the agreement with PETRONAS, Shell is considered the biggest natural gas generator in the Country. It was leader of the transmission of kerosene to the Far East; the first Malaysia first oil rig was discovered by Shell in 1910, moreover, the company built the first Malaysian clarifier in Miri in 1914. It built and first clarifier in Peninsular Malaysia’s in Port Dickson in 1963. As in late 50s this company was the first to do an exploration of seaward oil, it found oil and gas in Sarawak and then after that in Sabah waters (Daungkaew et al., 2007).

The Country has an important situation in global Shell, because in Southeast Asia, Malaysia is the first country which Shell established its companies. Marcus Samuel made a company 1830 in London which in 1880s the oil and gas was their main trade. Therefore in 1891 started Shell actions in Malaysia with the name of Marcus Samuel, because of extending too much the company in 1897, he decided to make a separated company to manage. ("The History of Shell in Malaysia," 2013)

1.5 HSE in Shell:
Shell Malaysia is committed to establish the best level of health and safety environment with this belief of doing ‘first in everything and best in everything’. Their HSE is according to quality management system. The company already has gotten environmental management system ISO 14001 and also got occupational health and safety management system (OHSAS 18001) which has certificated by an international body, therefore could be realized that the HSE of Malaysia is very strong. ("About safety.com," 2013) Alongside of global Shell, Shell of Malaysia is committed to do in terms of HSE.

The Company is continuing the idea of not harming people, the company tries to support and protection of the environment, plays a leading role in improving the best task in the industry, sharing in open -manner about HSE performance, using all material effectively to prepare its product and service, the main concentration of the company is managing carefully HSE issues as other critical side of business and making the culture that all Shell employees contribute this commitment.

In this way Shell Malaysia, they can have a good HSE performance; therefore the company can be proud of the confidence of the customers, shareholders and society in the wide range and be good neighbor to move on for consistent development ("Health, Safety, Environment Commitment and Policy," 2013)

1.6 ExxonMobil in Malaysia:
The ExxonMobil ancillaries companies in Malaysia are subsidiaries of the Exxon Mobil Corporation; it is pioneer worldwide industry in approximately every phase of the energy and petrochemical commerce. This was known as ESSO and Mobile corporations. Commencement of the work in the country returns about one century for the period of sale of kerosene. Today, actions of the company are different, limiting from the upstream activity of discovery and generation of oil and gas, to the downstream activity of refining and major contribution is to provide society with energy, petroleum and chemical products, in a safe, reliable and environmentally responsible manner. This helps ensure Malaysia’s continued economic growth and improves the quality of living (Wu, 1983).
The main offices are situated in Kuala Lumpur City Centre (KLCC). Key operations are in seaward Terengganu and in Port Dickson, Negeri Sembilan. There are almost 2,000 ExxonMobil workers. ("ExxonMobil in Malaysia," 2013).

2. Literature Review:
2.1 The Issues of Foreign Workers:
According to the foreign workers in all industry including petrochemical industry, they are faced with some problems such as delusion and false promises related terms and conditions of employment, take for example, the salary is more less than that they mention in the contract or not guaranteed annual leave or sick leave and also like long hour of working without compensation. ("Foreign Workers and Issue." Retrieved 2012)

Based on a letter from PETRONAS employees the salary which is paid is not as high as the others think and in in comparison of other industries, so some employees leave their job as a result of this. Based on this letter there has not been any bonus for 33 years in PETRONAS Malaysia.

According to some foreign employees one issue is identity card or the passport is being recorded by employer, the reason with the getting the identity cards the employers have more control over the employees and restrict them to move but this action can menace the workers with deportation because employers may go to immigration and cancel their work permit cause may employees want to defend their rights against the employers. Another issue which is mentioned in the article is wages for the foreign worker sometimes is paid in delay.(2013)

There is another issue which is mentioned to the article according department of Occupation and Safety (DOSH) is unsafe working conditions, where the employees work in unsafe condition as they do not have clear idea about the working situation and working manner that was already introduced to them. Sometimes the facilities and equipment that must provide for the employees’ safety are not provided. (Stanisl, 2012)

Another problem that happens quite often in the contract of employment is that different countries in different places have different way to write document having different type of contract term, clause or statement. According to Malaysian labor law minimum standards are compulsory and must be provided for the workers("Malaysian Labour Law, Regulation of Employment,” 2013).

2.2 The Cases Related to Employment Law in Malaysia:
2.2.1 Low Yook Meng Vs Shangri-La Hotel (Industrial Court):
The Facts:
The Claimant's claim against the Company was heard by the Industrial Court before the Learned Chairman Y.A. Puan Zura Yahya (as she then was) on 20.07.2006 and 21.07.2006 respectively. Subsequently, the Learned Chairman handed down Award No. 845 of 2007 dismissing the Claimant's claim, the Claimant then filed an Application for Judicial Review to the Kuala Lumpur High Court. The said Application was allowed with costs on 18.11.2009. The High Court quashed the Award No. 845 of 2007 of the Industrial Court. The Order of the High Court dated 18.11.2009 The High Court then remitted the matter back to the Industrial Court to assess the amount to be paid by the Company to the Claimant in respect (A) Claimant's back wages; (B) Compensation in lieu of reinstatement; and (C) Bonus Let me now deal with each of these items. (A) Back wages In determining back wages the following matters must be taken into account:

1. (1) The Claimant's last drawn salary in the Company was RM5, 068.00 per month. While this reference pre-dates the amendments to the Industrial Relations Act 1967, this Court takes into consideration the existing law, the law in force at the time the award is made which is in any event a codification of the guideline stated in Practice Note No 1 of 1987 which is a reflection of these established practice in the Industrial Court since 1980 to limit back wages to 24 months only.

2. (2) Whether contributory misconduct should be taken into account from the back- wages? The High Court did not make any finding as to whether the Claimant has committed any contributory misconduct. Therefore this Court will not deduct any quantum for contributory misconduct. (3) Whether in assessing back wages the post dismissal earning factor should be taken into account? The answer to this question is in the affirmative. “On appeal to the Federal Court in Dr. James Alfred, (Sabah) v. Koperasi Serbaguna Sanya Bhd. (Sabah) & Anor [2001]3 CLJ ruled; In the view, it is in line with equity and good conscience that the Industrial Court, in assessing the quantum of back wages, should take into account the fact, if established by evidence or admitted that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. Certiorari will therefore lie to rectify it. Of course, taking into account such employment after dismissal does not necessarily mean that the Industrial court has to conduct a mathematical exercise in deduction, what is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of back wages should take into account all relevant matters, including the fact, where it exists that the workman has been gainfully employed elsewhere after his dismissal.”

In the instant case there was evidence relating to the Claimants' post dismissal earning which is as follows, after his dismissal on 28.2.2001, he was unemployed until 1.6.2001.He was unemployed for 3 months where he was employed as a Maintenance Manager at Admiral Marina and Leisure Club (Admiral Marina)”
which is located in Port Dickson, Negeri Sembilan. In Admiral Marina he was paid a salary of RM4, 500.00 per month and his last drawn salary was RM4, 050.00 due to pay cut. His employment here lasted until April 2002. He was earning RM1, 000.00 per month less than what he would have earned at Shangri-La Hotel.

He subsequently held the position of Assistant Chief Engineer in the Pacific Regency Hotel Apartment from 1.5.2002 till 3.10.2003. He earned a basic monthly salary of RM4, 000.00 and his last drawn salary was RM4, 300.00. He was still earning about RM800.00 per month less than what he would have earned at Shangri-La Hotel.

(3) His last position was as Chief Engineer at SDB Properties Sdn. Bhd from 1.11.2003 until to date. Here he was earning a basic salary of RM5, 500.00 and his salary at the last date of hearing in this Company was RM6, 300.00. In assessing what quantum is to be deducted for gainful employment after his dismissal I am guided by Dr. James Alfred's decision where the Federal Court stated:-“of course, taking into account such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction.

What is important is that the Industrial Court, in the exercise of its discretion is accessing the quantum of back wages should take into account all relevant matters, including the fact, where it exists that the workman has been gainfully employed elsewhere after his dismissal”. Based on his post dismissal earnings, I am of the view a deduction of 30% from I am of the view a deduction of 30% from his back wages is considered reasonable and equitable.

(4) Whether the sum of RM1, 169.54 which was deducted from the Claimant due to his suspension from work from 15.2.2001 to 28.2.2001 should be paid back to the Claimant in view of the fact that the High Court had quashed the Industrial Court Award No. 845 of 2007? Since the High Court had quashed the Industrial Court Award the Claimant is therefore entitled to the said RM1, 169.54.

Compensation in Lieu of Reinstatement, the Claimant in his Statement of Case dated 10.02.2006 at paragraph 34 had pleaded “An award of compensation in lieu of reinstatement for unlawful dismissal without just cause and excuse of two months' salary in the sum of RM10,136.00 per month for each year of service (the Claimant's last drawn salary was in the sum of RM5,068.00 per month). However at paragraph 34 (iv) of the SOC the Claimant had pleaded “Further and or in the alternative, an award of compensation in lieu of reinstatement for unlawful dismissal without just cause or excuse in the sum of RM of 5,068.00 per month for each year of service (the Claimant's last drawn salary was in the sum of RM5,068.00)”.

In my view the High Court in its Order did not make any finding of punitive compensation to be awarded based on reasons and circumstances that will enable this Court to consider whether or not to allow the Claimant's compensation in lieu of reinstatement at two months' salary for each year of completed service as claimed by the Claimant. In the circumstances, the Court will grant the usual practice of awarding 1 months' salary for each year of service (the Claimant's last drawn salary was in the sum of RM5,068.00).

The Finding in the Court:

Based on the above mentioned calculation for (A) back wages; (B) compensation in lieu of reinstatement and (C) bonus the Court hereby orders as follows:-

(1) Back wages up to a maximum of 24 months RM 5,068.00 per month x 24 months = RM121,632.00 less 30% for post dismissal gainful employment = RM85,142.40

(b) Compensation in lieu of reinstatement i.e. one month of salary for every completed year of service (from 01.04.1985) to the date of dismissal (28.02.2001) = 15 years and 10 months. RM5, 068.00 X 15 months = RM76, 020.00

(c) Bonus entitlement based on the last drawn basic salary of RM5, 068.00. The following years:

- For the year 2001 - (1 month bonus) = RM5, 068.00, for the year 2002 - (1 month bonus) = RM5, 068.00 for the year 2003 (2 months' bonus) = RM10, 136.00, for the year 2004 , (2 ½ months' bonus) = RM12,670.00, for the year 2005 - (2 ½ months' bonus) = RM12,670.00 for the year 2006 - (1 month bonus) = RM5, 068.00, since he only served for 5 months his bonus should be pro-rated.

Total Bonus = RM50, 680.00 (d) Refund of the deducted sum of RM1, 169.54 to the Claimant due to his suspension from work from 15.2.2001 to 28.2.2001 as he was on half pay during that period. Therefore, based on items (a), (b), (c) and (d) under remedy the total sum payable by the Company to the Claimant is RM213, 011.94. The Company is hereby ordered to pay the sum of RM213, 011.94 less income tax deduction, if any, to the Claimant through his Solicitors, Messrs B. S. Sidhu & Co within 30 days from the date of this Award("Low YooK Meng Vs Shangri-La Hotel," 2013)

2.2.2. Rathimalar A/P Gnanasundram v RHB Bank Berhad & Anor (Industrial Court):
The Facts:
There is a case Rathimalar A/P Gnanasundram v RHB Bank Berhad & Anor in 2012. The issue was about stopping salary addition because of misconduct claim, therefore the employer decided not to continue salary increment. The employee stroked and offered a letter according the section 20 of industrial relation Act 1967 and saying that imposed constructive dismissal by the bank. The industrial court rejected the constructive dismissal, but the employee did another claim. The worker has done another application to judicial review in high court.

The first reason of constructive dismissal based Claimant was, refusing to sign-in and sign-out in the attendance register daily, which is required of employees of the 1st Respondent. The second reason that mentioned the court was, leaving the branch premises on numerous occasions without prior approval of her superior. The third reason that leads to employee to the constructive dismissal was reading newspaper during office hours; the last one was abusing her position as a bank officer by instructing her subordinate to perform work which is personal in nature and not related to the bank’s business.

The Verdict of the Court:
The Industrial Court had dismissed the appellant’s claim of constructive dismissal. The appellant application for judicial review was dismissed by high court. Having considered the appeal record and the submissions made, we found no merit in the appeal. We agreed with the learned High Court Judge that this was a simple case of an employee who was dissatisfied with the disciplinary punishment meted out and abandoned her employment without justification. Therefore we unanimously dismissed the appellant’s appeal and affirmed the decision of the High Court. Costs of RM10,000.00 was awarded to the 1st respondent.

The Comment:
To reach a conclusion, an employee has been constructively dismissed, the Court must determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee’s contract of employment. For this purpose, a judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt the essential terms of their employment contract were substantially altered. The fact that an employee may have prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee’s willingness to accept less than what she or he would have been entitled to. Therefore, what a lawyer should do some analysis, whether a particular employer initiated change amounts to constructive dismissal by a three part test, one, the terms of the contract should determine, between the parties (which may or may not be a hard copy contract, or could be an oral agreement), also the lawyer should try to realize that whether the employer has breached any of these terms; and determine whether the breach is a fundamental one, entitling the employee to consider that his or her contract has been repudiated or severed.

2.2.3 MBF Country & Resorts Sdn. Vs Suppiah Manickam (Industrial Court):
The Facts:
The second case happened in Malaysia in 2003, the issue arose when the company suddenly informed 4 of its employees the discontinuation of job because of retirement age that they reached, therefore the company gave them the 8 weeks required notice following 44 art he MAPA/AMESU Collective Agreement 1995. The employees claimed that for the benefits for lay-off day before mandatory retirement. Article 44 of collective agreement says the age of retirement is 55 but with manual agreement between two parties employee shall continue his/her work and because of the employment did not stop working at the age of 55, dismissed his request.

The comment:
This article has been so specifically couched in order to enable the employer and employee to enter into a fresh employment contract for any period of service, such that the period so agreed upon does not extend beyond the employee attaining 60 years of age. And, should the parties fail to enter into such fresh employment contracts, the employee is deemed to have continued employment on a month to month basis. This must be so; otherwise an employee who continues in employment after he or she has attained 60 years of age (as happened in the case of the third respondent) would ipso facto contend that the retirement age set in art. 44(a) of the CA has been uncapped and he or she need not retire at all. Most importantly in the instant case, it has to be concluded, and I would hold, on the evidence adduced, that the proviso (second limb) in art. 44(a) was not triggered into operation, as clearly, no fresh employment agreement, in writing or orally, has been entered into between the appellant and any of the respondents to re-cap the retirement age at 60. It cannot in law or logic be concluded or presumed, bereft of any evidential basis that the appellants had agreed to re-cap the retirement age at 60 on the sole basis that the appellants had in fact allowed the respondents to continue in employment after they had turned 55 years of age.” ("Skrine," 2013).
REFERENCES