IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 32

Suit 345/1988, 532/1988

Between

Ler Hock Seng

… Plaintiff

And

Bethlehem Singapore Pte Ltd

… Defendant

GROUNDS OF DECISION

Employment Law — Benefits

Version No 1: 29 Oct 2026 (23:45 hrs)

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Ler Hock Seng and Others v Bethlehem Singapore Pte Ltd

[1994] SGHC 32

Suit 345/1988, 532/1988
Warren Khoo L H J
09 February 1994

1 Cur Adv Vult

2 In these consolidated suits, the plaintiffs seek the court`s determination of the amount of retrenchment benefits they were entitled to receive under their contracts of employment with the defendant company.

3 **The facts**

4 The company was incorporated in Singapore in 1969. It was a joint venture between the Bethlehem Steel International Corporation, an American corporation, and The Development Bank of Singapore, with the former holding the majority of the $15m paid-up shares. The company was in the shipbuilding and other marine and related businesses. It commenced business in 1970. It went into members` voluntary winding up in 1988.

5 Some of the company`s employees were members of a trade union, the Shipbuilding and Marine Engineering Employees` Union. The plaintiffs were not. They held supervisory, technical, secretarial and clerical positions and the like. They had been in the service of the company for varying periods. Most of

them started from the early days of the company, in the early 70s. A few started in 1980. One started in 1982.

6 The dispute turns on the ascertainment and construction of the terms of the plaintiffs` employment. The starting point is the plaintiffs` letters of appointment. Not all of them have been produced. The ones available, in addition to providing for remuneration and CPF contributions, provide for `other benefits` as follows:

> *Variant 1:*
>
> *You will be entitled to all other benefits applicable to your employment status* ***in accordance with the company`s current policies and practices*** *and subject to the provisions of any relevant law. [Emphasis added.]*
>
> *Variant 2:*
>
> *You will be accorded all other benefits applicable to your employment status* ***in accordance with the current company`s policies and practices.****[Emphasis added.]*
>
> *Variant 3:*
>
> *You will be entitled to all other benefits, including but not limited to retrenchment benefits, applicable to your employment status* ***in accordance with the company`s prevailing policies and practices*** *and subject to the provisions of any relevant law. [* ***e****mphasis added.]*

7 The company accepts that all the plaintiffs are entitled to retrenchment benefits as a matter of right. The only argument is as to the amount of retrenchment benefits they are entitled to. Although slightly differently worded, it is common ground that all the provisions set out above have similar effect. In particular, no reliance is placed by either party on any distinction between `current` and `prevailing`. I can therefore proceed on the basis that all the letters of appointment had provided that the plaintiffs were entitled to retrenchment benefits in accordance with the company`s `current` or `prevailing` policy and practice. It is also common ground that there are no statutory provisions in

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relation to retrenchment benefits which are applicable. So, for present purposes, the words `subject to the provisions of any relevant law` may be disregarded.

8 Towards the end of 1987, the company decided to close down their operations.

9 On 3 November 1987, a collective agreement was signed between the Shipbuilding and Marine Engineering Employees` Union and the company under which all unionized employees with more than three years of service with the company were to be paid half a month`s basic wage for each year of service pro-rated for any incomplete year of service, subject to a maximum of five months` basic wages or $6,250, whichever was the less.

10 On 1 December 1987, the company sent retrenchment notices to all the plaintiffs, terminating their employment with effect from 31 December. The company also stated in the retrenchment notices that the plaintiffs would be paid retrenchment benefits at the rate and subject to the maximum which it had agreed with the union in respect of the unionized employees. In the event, the plaintiffs were paid $6,250 each.

11 They felt aggrieved. On 22 February 1988, three of them commenced action in Suit No 345 of 1988. On 16 March 1988, the other 42 plaintiffs commenced Suit No 532 of 1988.

12 On 22 April 1988, the directors filed a declaration of solvency preparatory to putting the company into members` voluntary winding up. The statement of affairs attached to the declaration shows a surplus of $5.24m of assets over liabilities. The Registry of Companies records show the effective

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date of the winding up as 11 May 1988. I assume that means the date of the meeting at which the necessary resolution was passed.

13 **Past retrenchment exercises**

14 The retrenchment exercise was the last undertaken by the company, but it was not the first. In answer to queries from the plaintiffs` solicitors, the liquidators` solicitors stated in a letter dated 16 November 1992 and I quote:

> (1) The company carried out approximately ten retrenchment exercises in the past.
>
> (2) The first of these was sometime in 1975 or 1976 and a few exercises were carried out in these years.
>
> (3) These retrenchment exercises included both union and non-union employees.
>
> (4) The benefits paid were one month`s pay per year of service for those with more than three years` service in all retrenchments except for the final retrenchment exercise when the yard was closed and sold at the end of 1987.

15 Thus, the company had carried out no less than ten (other) exercises since 1975 or 1976. The available documents show that there were five retrenchment exercises in various months in 1976 and one in January 1977. That accounts for six. It would be relevant to know when the other four retrenchment exercises took place. No documents relating to them were produced, and the company`s solicitors stated in their letter that the company`s records that were available did not contain the information. I must say this is quite surprising, and unfortunate. I would have expected a company of this standing to have a proper system of filing documents, particularly those concerning administrative, accounting and personnel matters.

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16 As these actions were started in February and March 1988, before the company went into liquidation, I would also have expected the company or the liquidators, when faced with these court actions, to take special care to preserve the relevant documents. Instead, all that we have now is the far from precise statement of the company`s solicitors concerning these vital matters.

17 In the absence of direct evidence, I would do my best by turning to other indicators. I see from the accounts of the company that its annual profit after taxation picked up in 1978, and increased steadily in the following years until 1982, when it showed a slight drop, and 1983, when it suffered a severe drop. This was followed by substantial losses in 1984, 1985 and 1986.

18 In the absence of evidence to the contrary, I think there is more than an even chance that the retrenchment exercises after January 1977 which are unaccounted for took place not very long before the retrenchment exercise in December 1987 which affected the plaintiffs. It is more likely for them to have taken place in those three bad years of 1984, 1985 and 1986, rather than in any earlier years, as the company had been doing quite well until 1983.

19 It is clear from the company`s solicitors` letter, that in all the retrenchment exercises in the history of the company, it had consistently paid retrenchment benefits, for all employees who had served more than three years, at the rate of one month`s pay for each year of service.

20 I have before me copies of the announcements of the six retrenchment exercises in 1976 and 1977. They were addressed to all the employees of the company. They appear to have been given to those who remained as well as to those who had to go. It was announced in these notices that those with more than three years of service were to be paid retrenchment benefits at the rate of

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one month`s basic wage for each year of service. Those with less than three years were to receive ex gratia payment at a reduced rate. The announcements exhorted those who were not retrenched to continue to work diligently for the company and help to improve the company`s competitive position. I would assume that the announcements of the other retrenchment exercises down through the years were worded in a similar fashion.

21 **The contentions**

22 The plaintiffs contend, in short, that because of the consistent practice of the company of paying employees with more than three years` service one month`s wages for each year of service by way of retrenchment benefits in every previous retrenchment exercise, that practice had become a term of the contract of employment between the plaintiffs and the company. Alternatively, the plaintiffs contend that such a term must be implied from this previous course of dealing.

23 The company, on the other hand, at first pleaded that there was no obligation, either by contract or by law, on the part of the company to pay any retrenchment benefits to the plaintiffs. This position was not persisted in at the hearing. Counsel for the company conceded before me that the plaintiffs were entitled under their contracts of employment to receive retrenchment benefits. He contended, however, that the company had an unfettered discretion to decide the amount of the retrenchment benefits, and that whatever it decided at any point of time then represented the company`s `current` or `prevailing` practice or policy, and that was what the plaintiffs were entitled to receive. It followed that since the retrenchment notices served on the plaintiffs provided for the rate of half a month`s wages for each year of service subject to a maximum of five months` basic wages or $6,250 (whichever was the lower), that was what the

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plaintiffs were entitled to receive. Counsel further argued that the company could not have maintained a `current or prevailing` policy in regard to retrenchment benefits.

24 In support of his contentions as to the meaning of the words `current`, counsel cited ***Granby Consolidated Mining, Smelting and Power, etc Co Ltd v A-G for British Columbia*** , ***Britain SS Co Ltd v Bunge & Co Ltd*** and ***Re Application by Laycock and Ong*** .

25 Essentially, these cases show that `current` is whatever is current at the time the transaction in relation to which the word is applied took place, eg when a tax assessment is made or an application for a rent revision is made. Counsel submitted that `prevailing` had a similar meaning.

26 **My views**

27 I approach the matter on two alternative bases. Firstly, I shall attempt to ascertain what was the `prevailing` or `current` practice of the company as of December 1987, when the retrenchment exercise in question took place. I think that the evidence of a consistent practice followed by the company for many years right up to a time, as I find, not long before the December 1987 retrenchment, enables one to say, with reason and a fair degree of confidence, that the `prevailing` or `current` practice of the company, as of December 1987, was to pay those with more than three years` service at the rate of one month`s basic wages for each year of service. This resolves the question purely on the application of the provision in the letters of appointment regarding retrenchment benefits.

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28 The alternative basis is by way of an implied term, in effect treating the consistent practice of the company as having become a term of the contract independently of the provision of the initial letter of appointment.

29 The learned editors of 16 ***Halsbury`s Laws of England*** (4th Ed), at para 54, put the matter of implication of terms in a contract of employment as follows:

30 **Implication of terms**

31 Given that the employment relationship is explained legally in contractual terms, the ordinary law of contract is applicable. Classically, a term may be implied into a contract either on the `officious bystander` test or the `business efficacy` test; both of these tests are essentially subjective, looking for implied agreement by the parties, with the emphasis against the implication of a term merely because it appears reasonable to the court. These tests may well be applied in cases concerning contracts of employment, but arguably a generally wider approach is justified in this context, not only because the implied term will be more frequently used as a device to impose a particular legal solution or requirement on to contracts of employment as such, but also because historically contracts of employment have left more to be filled in by implied terms than most other types of contract. Moreover, the need to fill such gaps may be more urgent, either to fulfil statutory obligations or simply in order to make legal sense of an employment relationship that clearly exists in practice. Arguably, therefore, orthodox contract law on the implication of terms may need to be stretched in the context of employment, in particular by placing more emphasis on what would be reasonable terms and by allowing the court to look at the parties` behaviour during the employment but subsequent to the entering of the contract of employment.

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32 The case for such a broad and common sense approach suggested by the learned editors, as I see it, rests on the fact that rights and obligations of the parties to an employment contract are ordinarily not static; they do evolve in the course of time. The initial contract entered into between the employer and employee does not always reflect the rights and obligations which have been developed in the course of time. What the parties actually did after the conclusion of the initial contract of employment may, in an appropriate case, be more reliable evidence of the terms of the contract than what they agreed initially.

33 Take the present case. Over the years, the amount of the retrenchment benefits had been fixed whenever a retrenchment exercise was undertaken. In respect of those with less than three years` service, the benefits were expressly stated to be ex gratia. In respect of those with more than three years` service, no such words were used. In all cases, no reference was made at all to the terms of the letters of appointment of those affected. The company simply told those to be retrenched what benefits they were to receive. Those who were not retrenched in these exercises and who were extended copies of these retrenchment notices could reasonably expect that if ever their turn came to be retrenched, they would be paid the rate stated repeatedly in these retrenchment notices. The company, thus, in the course of time can be said to have held out to all its employees that that was the rate that would be paid in the event of any future retrenchment, and this was tacitly accepted by the employees. In these circumstances, the wording of the `other benefits` clause in the letter of employment, issued years before, was in all probability overshadowed, if not overtaken, by the consistent practice of the company. I venture to say that had any employee been asked, immediately before the retrenchment exercise in question in this suit, what benefits he could expect to receive in the event of his

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retrenchment, his answer would have been obvious, ie that he would get what employees previously retrenched had got. The company had not at any time done anything to disabuse its employees of this notion.

34 In these circumstances, anything in the `other benefits` clause of the letter of appointment which might have given the company liberty to decide the amount of retrenchment benefits was probably all superseded by the consistent conduct of the parties. The practice in effect became a term of the contract. This is what I think the learned editors of ***Halsbury`s*** refer to as implying a term.

35 Much the same approach was adopted by Stephenson LJ in ***Mears v Safecar Security Ltd*** at p 76, although the matter was approached there in the manner of supplying a missing term. The case concerned the Employment Protection (Consolidation) Act 1978 of the United Kingdom, which requires an employer to give to his employee written particulars of his terms of employment within 13 weeks of the commencement of his employment. The employers failed to include, in the particulars they furnished to the employee, any particulars regarding entitlement to sick pay. The employee applied to an industrial tribunal for a determination of what particulars relating to sick pay ought to have been included in the written particulars of his employment. The case went through the industrial tribunal and the appeal tribunal, and it eventually went to the Court of Appeal, which was asked to give general guidance on how an industrial tribunal should imply or insert missing terms in a contract of employment. Stephenson LJ said that when, in exercising their jurisdiction under the Act, an industrial tribunal has to imply and insert missing terms:

> *... they are not tied to the requirements of the test propounded by Scrutton LJ and MacKinnon LJ, a test for commercial contracts which goes back to* ***The Moorcock*** *(1889) 14 PD 64, but can and should consider all the facts and circumstances of the*

> *relationship between the employer and employee concerned, including the way in which they had worked the particular contract of employment since it was made, in order to imply and determine the missing term which ought to have been particularized by the employer and so to complete the contract.*

36 I would hold, therefore, that the company`s practice of giving retrenchment benefits at the rate stated for employees with more than three years` service had, through a consistent course of dealing, become a term of the contract of employment between the plaintiffs and the company.

37 I am conscious that my views might be taken to extend to all benefits extended by an employer to his employees. I would simply say that each case depends on its own facts.

38 **The discretion argument**

39 The company says that, under the terms of the contract, it has an unfettered discretion to determine what amount of retrenchment benefits the company should pay. I think that the company at the beginning, no doubt, had a discretion in this matter. However, having fixed a formula for payment of these benefits and adhered to it consistently in the manner I have stated, I think it ceased to have any discretion at some point of time. In any event, if a contract gives one party to it the right to decide a matter which involves the rights and obligations of the two parties, it surely goes without saying that that party must exercise that right reasonably. In the light of the established practice of the company of paying retrenched employees at the rate I have mentioned, is it reasonable for the company by a stroke of the pen to make such a substantial change to the established rate? Plaintiffs` counsel has calculated the difference in the retrenchment benefits payable to the plaintiffs in the sum of $1.3m. I do not know whether he bases it on the last drawn gross salaries of the plaintiffs or

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their basic salaries, but the difference on either basis is quite substantial for persons in the plaintiffs` position. To my mind, anything that produces a result like this cannot be an exercise of discretion; it is, without disrespect, more like whim and fancy.

40 **Conclusion**

41 I, therefore, allow the plaintiffs` claim. I hold that the plaintiffs, all of them having had more than three years of service with the company, are entitled to be paid retrenchment benefits at the rate of one month`s basic salary for each year of service. In the event of any dispute as to the length of service or the last drawn basic salary, I order all necessary inquiries. I also order judgment to be entered in terms of the amount agreed or ascertained less the amount of $6,250 already received, including interest at the rate of 6% pa on the net amount from 1 January 1988. The plaintiffs shall have the costs of this action.

42 ***Plaintiffs` claim allowed.***

Warren Khoo L H J

Harbajan Singh (Daisy Yeo & Co) for the plaintiffs
Jude P Benny and Abbas Ali (Joseph Tan Jude Benny & Co) for the defendants

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