

INDUSTRIAL COURT MALAYSIA

CASE NO.: 6(15)/4-1111/20

BETWEEN

MOHD ZULFADLI BIN NORUDDIN

AND

AMALAN SETAR (M) SDN. BHD.

AWARD NO.: 1469 OF 2021

**BEFORE : YA PUAN REIHANA BINTI ABD RAZAK
CHAIRMAN**

VENUE : Industrial Court ,Kuala Lumpur

DATE OF REFERENCE : 05.07.2020.

**DATES OF MENTION : 28.08.2020, 02.10.2020, 12.10.2020,
01.03.2021, 15.03.2021, 30.03.2021,
30.04.2021.**

DATE OF HEARING : 09.02.2021.

REPRESENTATION

**Counsel for the Claimant : Encik Mohamad Nasruddin bin Ab Rahman
Messrs Nas Rahman & Co.**

**Counsel for the Company : Mr. Kuhan Pillai a/l Chandraseharan
Messrs Rajendran & Deen**

REFERENCE:

This is a reference by the Minister of Human Resources pursuant to Section 20(3) of the Industrial Relations Act 1967 arising out of the dismissal of **Mohd Zulfadli bin Noruddin** (“the Claimant”) by **Amalan Setar (M) Sdn. Bhd.** (“the Company”) on 20.01.2020.

AWARD

BRIEF FACTS

[1] The Claimant commence employment with the Company as a Quantity Surveyor from 01.09.2018 with a basic salary of RM4,800.00 per month and a monthly allowance of RM1,000.00.

[2] The Claimant was confirmed by letter dated 30.11.2018 and his salary was revised to RM5,000.00 per month effective 01.12.2018.

[3] On 20.01.2020, the Company issued a letter terminating the Claimant with immediate effect pursuant to Clause 9 of the Letter of Appointment and was paid of RM7,160.97 in lieu of the notice.

[4] The Claimant asserts that his dismissal was without just cause or excuse and that the Company did not provide any reason for his termination.

COMPANY'S PLEADED CASE

[5] The Company avers that as a Quantity Surveyor, the Claimant's scope of work with the Company includes conducting site valuation, monitor the usage of the diesel by the Company's contractors at the site and back charge them and to prepare payment recommendation accordingly.

[6] The Company contended that for its Alamanda Parklands, Rawang project, the Claimant did not monitor the usage of the diesel by the contractors and did not back charge them.

[7] The Company contended that arising out of the Claimant's failure to carry out his duty to monitor the usage of the diesel by the contractors, the Company had incurred losses by not being able to back charge the respective contractors as their progressive payments have been settled without being aware of the accrual of these amounts for their usage of the diesel.

[8] The Company also avers that the Claimant failed to carry out site valuation on a periodical basis as expected out of him for the Taman Sutera Raub, Pahang project under his supervision.

[9] The Company avers that the Claimant instead of carrying out site valuation, prepared payment recommendation and had submitted them to the Company for approval solely based on photographs sent to him by the contractors.

[10] The Company contends that upon the completion of the project, the Company discovered that some of the works carried out by the contractors were unsatisfactory, not according to the specifications and with defects.

[11] The Company contended that as the final payments were already made based on the payment recommendations prepared by the Claimant, the Company were unable to hold those contractors responsible to remedy the said defects caused by them.

[12] The Company contended that due to the Claimant's failure to perform his duties, the Company had to engage separate contractors to

rectify the plumbing defects and the architectural defects which cost the Company to incur additional cost.

[13] The Company contends that had the Claimant conducted the site inspection as expected out of him, he should have discovered those defects and the Company would have ensured that those defects were remedied by the respective contractors prior to releasing the payments.

[14] It was the Company's assertion that the Taman Sutera project was the first outstation project undertaken by the Company where the defects on the constructed project in which the Company had to remedy had taken a toll on the Company's reputation as a property developer in the market.

[15] The Company contended that due to the Claimant's negligence in relation to its Taman Sutera project, the Company had suffered total losses of approximately RM379,087.00.

[16] The Company contended that upon realizing the Claimant's failure to discharge his obligations throughout the entire year of 2019, the Company decided to investigate into the matter by reviewing his performance.

[17] The Company further avers that, beside the non-performance of the works, the Claimant too were constantly absent from work.

[18] The Company contended that on 17.01.2020, the Company conducted an inquiry with the Claimant where they found that they could not further rely on the Claimant with its projects as it was taking a toll on the Company.

[19] The Company contended that they decided to terminate the Claimant from his employment giving him 2 months' salary in lieu of notice with effect on 20.01.2020.

[20] The Company contended that the Claimant had been notified and warned respectively of his poor work performances.

[21] The Company avers that despite claiming to possess 12 years of experience in the field, the Claimant failed to meet the minimum standard of a Quantity Surveyor as expected by the industry.

[22] The Company contends that the Claimant's termination of employment with the Company was with just cause and excuse.

CLAIMANT'S PLEADED CASE

[23] The Claimant avers that he is a Quantity Surveyor with a long experience of 12 years where before working with the Company he has worked in several other companies around the Klang Valley.

[24] The Claimant contended that the confirmation of this position by the Company proves that the Company was satisfied with his work performance during his probationary period in the Company.

[25] The Claimant contended that during his employment with the Company, he was never given any warning by the Company about his quality of work neither has any disciplinary record while working with the Company.

[26] The Claimant avers that he was assigned to manage the housing projects at Alamanda Parkland in Rawang, Selangor and Taman Sutera in Raub, Pahang.

[27] It was the Claimant's case that on 20.01.2020 while working at the project site in Raub, Pahang, he received a call from the office instructing him to return to the office. Upon returning to the office where

he was then given a termination letter dated 20.01.2020 with a cheque in the amount of RM7,160.97.

[28] The Claimant avers that there was no reason or ground for the termination given by the Company in the termination letter.

[29] The Claimant asserts that his termination by the Company is a wrongful and unfair dismissal as the Company did not state any reason for the termination on 20.01.2020.

[30] The Claimant asserts that his termination is clearly contrary to labour law and a termination simpliciter made without any reasonable excuse.

[31] The Claimant also avers that he was victimized by the Company and his termination was not done bona fide as there was no reason or ground provided to him by the Company before terminating him.

LAW

[32] The function of the Industrial Court is sufficiently explained in the case of ***Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129*** the Federal Court decided as follows:

“Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper inquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.”

[33] The Federal Court in the case of ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal*** [1995] 3 CLJ 344 decided as follows:

“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 the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.”

[34] In ***Sitt Tatt Bhd v. Ong Chee Meng*** [2004] 2 ILR 388 it was held inter alia:

“The Company was fully entitled to terminate the Claimant’s service if upon their evaluation, he was found to have been unable to perform his job functions satisfactorily. The yardstick used to gauge the Claimant’s performance was left to the company’s prerogative as long as it was not tainted by mala fide intentions. It was the Claimant’s duty to measure up to the company expectations...”

[35] In the instant case, the termination was effected by giving 2 months’ notice pursuant to the “Termination Notice” Clause 9 in the Letter of Appointment.

[36] As Claimant’s termination is effected by a contractual notice and without any reason given, it is a termination simpliciter which is no longer valid in the force of Section 20 of IRA that gives protection to workmen and it is subject to industrial adjudication in this Court.

[37] In ***Dr. A. Dutt v. Assunta Hospital*** [1981] 1 LNS 5 the Federal Court held:

“...A termination by contractual notice and for no reason, if ungrounded on any just cause or excuse would still be a dismissal without just cause or excuse and on the workmen's representation, the Industrial Court may award reinstatement or compensation in lieu of reinstatement.”

[38] In ***Raman a/l Perumal Thever v. National Land Finance Co-Operative Society Ltd. And Industrial Court Malaysia, Usul Perumula No. R8-25-121- 1990 (The Society Case)***, the Supreme Court's decision is that even if no reason or another reason is given in the notice of termination, this Court has the right to enquire into other grounds subsequently put up by the employer to justify the dismissal.

[39] In this respect, it was held in the case of ***Galiff (M) Sdn. Bhd. v. Tay Keng Lock [1993] 2 ILR 169*** as follows:

“.....The law as it stands, after the Supreme Court's decision is that even if no reason or another reason is given in the notice of termination, this court has the right to enquire into other grounds subsequently put up by the employer to justify the dismissal. This Court is bound by the Society's case and there is no choice butto adopt the ratio decidendi of the Supreme Court.”.

[40] The Society's case was re-quoted in ***City Bayview Hotel Penang, The v. Eddy Samuel [2004] 3 ILR 364***, where the Court does not agree with the Claimant on his termination in the situation where the reason for his termination was not stated in his letter of termination of service is void in law.

[41] As such, though no reason is given in the notice of termination, this Court is not precluded from inquiring into other grounds subsequently put up by the employer to justify the dismissal.

[42] The issue before the Court is whether the Company had proven the Claimant's misconduct. If the answer is in the affirmative, the next question is whether the alleged misconduct is a just cause or excuse for the dismissal.

[43] In the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314 the Court made it clear that the standard of proof required of the employer to prove the misconduct justifying the dismissal or termination is on a balance of probabilities.

EVALUATION AND FINDINGS

[44] The Company dismissed the Claimant from his employment with immediate effect vide letter dated 20.01.2020 [COB page 10] where no specific ground was stated in the letter.

[45] The Company in its Statement in Reply, detailed out the Claimant's task and as a Quantity Surveyor for the Company's projects assigned to him.

[46] COW-1 who is a Quantity Surveyor currently employed by the Company to do the Claimant's function gave a clear description of his profession as a Quantity Surveyor where he states that role of a Quantity Surveyor is doing cost control, visiting the construction site to certify and evaluate the work done on site as per the contract specification.

[47] The Claimant on the other hand avers that he only knew of the misconducts raised by the Company against him is when the Statement in Reply was filed by the Company.

[48] It was the Claimant's averment that COW1 and COW2 are not the relevant witnesses to be called to testify on behalf of the Company as they both have no knowledge of the Claimant's dismissal.

[49] The Claimant contended that COW-2's evidence is merely 'hearsay' evidence because COW2 have no knowledge of

the Claimant's dismissal as COW2 only commence employment with the Company after the Claimant was dismissed.

[50] The Claimant asserts that the failure of the Company to call its General Manager one Mr. Foong Kui Koon who issued the termination notice dated 20.01.2020 as witness to testify during the trial had caused the Claimant to lose his opportunity to challenge the witness on the allegations made by the Company against him as stated in the Statement in Reply.

[51] It was the Claimant's case that the task of supervising the daily use of diesel was not his responsibility but of the site supervisor one Mr. Kumar who was most of the time at the construction site.

[52] The Claimant also avers that as he is mostly at the office in Kuala Lumpur, it is impossible for him to be assigned to supervise the daily usage of diesel by the Company's contractors.

[53] The Claimant contended that since 23.07.2019, he had requested from the Site Supervisor (Mr. Kumar) an update of the diesel usage at the construction site for him to prepare the summary of the diesel usage and charge the contractors for the usage at the site, but the said Kumar

did not do so despite repeatedly asked by the Claimant until the Claimant was dismissed.

[54] The Claimant avers that it was impossible for him to know the daily consumption of diesel of the Alamanda Parklands, Rawang construction by the contractors, as he was not at the site every day.

[55] The Claimant avers that the Company had not made payment to the contractor in full, as such the Company did not suffer any loss as alleged.

[56] The Claimant avers that the Company never give him any warning or show cause letter seeking his explanation regarding the alleged uncharged diesel usage.

[57] The Claimant asserts that all the Company's allegations against him as pleaded in the Statement in Reply are merely after thoughts designed to justify the dismissal which was made without any reason and tainted with mala fide.

[58] The Company dismissed the Claimant from his employment with immediate effect vide letter dated 20.01.2020 [COB page 10].

The Termination Letter is reproduced as follows:

“RE: Notice of Termination

Refer to the above matter, the Management has been decided that your last working day shall be on 20th January 2020. In lieu of this, the Management will pay your salary until 19th March 2020, as per your Letter of Appointment dated 25th July-2018, Clause 9.

We enclosed herewith the cheque no. RHB 003222 for RM7,160.97 towards the following payment after the relevant statutory deduction, details of which as follows:

| | | |
|----------------------------------|-----|-----------|
| Salary as at 15.3.2019 | RM | 14,064.52 |
| Pay Back Annual Leave (7.5 days) | RM | 1,442.30 |
| | RM | 15,506.82 |
| Less: EPF, Socso & EIS deduction | (RM | 3,163.40) |
| Salary paid on 20.01.2020 | (RM | 5,182.45) |
| | RM | 7,160.97 |

Thank you.

Yours faithfully,
AMALAN SETAR (M) SDN. BHD.

FOONG FUI KOON
General Manager”

[59] Looking at the termination letter, it is obvious there were no specific grounds made known to the Claimant in the said letter before the Company terminates the Claimant.

[60] Although the Company did not give any reason in the notice of termination, this Court is not precluded from inquiring into grounds subsequently put up by the employer to justify the dismissal.

[61] It was not disputed that the Claimant had claimed himself as a Quantity Surveyor of 12 years' experience when he joined the Company.

[62] The Claimant never dispute that the Company had tasked him to manage the Alamanda Parklands Project and the Taman Sutera Project.

[63] COW-1, the Company's other Quantity Surveyor who took over responsibility of the Claimant upon him being dismissed gave detail evidence on the back charges of diesel usage by the Company's contractors.

[64] COW-1's evidence especially on the contractors which the Company were unable to recover the money from for their usage of diesel was not disputed by the Claimant.

[65] As such, the Company's contention that because the Claimant did not carry out his duty and responsibility diligently to monitor the diesel usage, the Claimant could not back charge the contractors as they have insufficient funds with the Company was never challenged.

[66] Neither did the Claimant challenge the fact that the reason for the Company to be unable to back charge the contractors was because there were no amounts owing to the contractors by the Company.

[67] The Claimant's contention that the site supervisor failed to provide him the breakdown of the diesel usage by each contractor which caused him to be unable to perform his task and that the task of back charging should be the responsibilities of the site supervisor is just a mere after thought and without merit.

[68] The Claimant's averment that the task of back charging is more appropriate to be done by the site supervisor one Mr. Kumar as he is the person at site is an attempt trying to shift the blame of his failure to back charge which was actually the Claimant's responsibilities to the site supervisor.

[69] There was no evidence adduced to show that the task to back charge was assigned to the site supervisor or ever done by the site supervisor.

[70] The Court is of the view that as the Claimant did not dispute nor challenged COW-1's evidence with regards to roles as a Quantity Surveyor in the Company, the Claimant is only seen attempting to shift the blame to the site supervisor.

[71] There was no evidence adduced by the Claimant to show that his role and that of COW-1's as Quantity Surveyor for the Company was different.

[72] The Court opined that it was the Claimant's responsibility as Quantity Surveyor to obtain the breakdown of the diesel usage from the site supervisor.

[73] Neither is the Claimant expected to be at the construction site throughout the day to monitor the diesel usage. All that was required from the Claimant is to chase for the breakdown from the site supervisor and back charge the contractors which he had failed to do so.

[74] Had the Claimant carried out his duty and responsibility diligently in obtaining the breakdown of the diesel usage from the site supervisor, he could have successfully back charged each contractor and recovered the monies spent by the Company.

[75] The Court is also of the view that the Claimant's text messages between him and the site supervisor in his attempt to establish that he had pressed the site supervisor to provide him with the breakdowns, could not be used to show that he had performed his responsibility.

[76] As such, in the absence of any other evidence to the contrary, the Company had proven its contention that the Claimant failed to perform his duty and responsibility diligently when the Company could not back charge the contractors for the diesel usage by them.

[77] It is therefore clear facts that due to the Claimant's failure to perform his duty and responsibility, the Company had to bear the losses for the contractors' usage of diesel at the site.

[78] It could not be denied that the Claimant's failure to back charge the respective contractors for the diesel usage, the Company were unable to recover the cost spent in purchasing the diesel.

The accumulated cost for the diesel usage by the contractors which could not be recovered by the Company remained unchallenged.

[79] The Court opined that it is a fundamental failure of the Claimant in discharging his obligation as a Quantity Surveyor by the minimum standard expected in the industry.

[80] On the issue of the Claimant's failure to perform proper and periodic site valuation, the Company's evidence with regards to the defects found at Taman Sutera Project was never challenged.

[81] The Claimant did not deny that the site valuation is expected to be conducted properly and periodically to ensure that the contractors had done their part of the construction work according to the specifications contracted for and to the satisfaction of the Company.

[82] It was not disputed that there were defects on the plumbing works by Sejati Plumbers and architectural works defects by Bina Satu Padu for the Taman Sutera Project to which the Claimant prepared the final payment recommendation for both works carried out by the contractors.

[83] The Company contends that the Claimant did not carry site valuation for the works performed by Sejati Plumbers and Bina Satu Padu for Taman Sutera Project was not disputed.

[84] Neither could the Claimant adduce or show evidence that he had indeed conducted site valuation for the works performed by Sejati Plumbers and Bina Satu Padu before preparing the final payment recommendation.

[85] As there is no other evidence produced by the Claimant to negate the Company's contentions, the Company's allegation that the Claimant did not conduct site valuation for the works performed by Sejati Plumbers and Bina Satu Padu before preparing the final payment recommendation is consistent and remained unchallenged.

[86] The Court opined that if the Claimant had conducted site valuation for the works performed by Sejati Plumbers and Bina Satu Padu properly and diligently, he would have discovered the plumbing defects of Sejati Plumbers and architectural defects of Bina Satu Padu at the Taman Sutera Project.

[87] The Court finds that had the Claimant discovered the defects on the site valuation, prior to preparation of the final payment recommendation for both the contractors, he could have prevented or delayed the said final payment to the contractors till the defects are rectified.

[88] It is clear evidence that the Claimant prepared the final payment recommendation in April 2019 and the Company only discovered the defects after releasing the final payments based on the final payment recommendation prepared by the Claimant.

[89] As there is no evidence that the Claimant conducted the site valuation, the Company had to incur the additional expense of engaging another contractor to rectify the defects occasioned by the earlier contractors.

[90] The Claimant too did not dispute the additional cost incurred by the Company to rectify the defects.

[91] As such, it is clear that the Claimant failed to carry out site valuation for this project on a periodical basis as expected out of him.

[92] The Claimant contended that his dismissal is not *bona fide* and that he was victimized as his shortcoming was not brought to his attention or that he was given sufficient opportunity to improve before dismissal.

[93] It is clear that from the Company's evidence, in the Claimant's performance review conducted sometime in December 2018, the Company's Manager had brought to the attention of the Claimant that he is to be actively engaged and lead the process of product development stage in terms of costing, and to highlight on any values engineering during product development stage. The Claimant did not challenge this evidence at all. Therefore, the Claimant was always aware of his role and function in the Company.

[94] As such, as the construction of the project progresses, the Claimant's role was to conduct site valuation on a periodical basis to ensure that the contractors had carried out the works according to the specifications and to the satisfaction of the expected standards.

[95] The Court opined that only upon the Claimant's satisfaction, he prepares the payment recommendation for each of the contractors, in which the Company would make the payments accordingly.

[96] There was no evidence to the contrary adduced by the Claimant to negate this role. Instead, the Claimant prepared payment recommendation and had submitted them to the Company for approval solely based on photographs sent to him by the contractors.

[97] The Court is of the view that the very act of the Claimant went on preparing the payment recommendation based on photographs sent to him and not carrying out site inspection is a fundamental failure of the Claimant in discharging his obligation as a Quantity Surveyor by the minimum standard expected in the industry.

[98] The Claimant too did not deny that his role includes site valuation for this project on a periodical basis which he failed to do as expected out of him.

[99] The Company's evidence that should the Claimant had discovered those defects upon having to conduct site inspection as expected out of him, the Company would have ensured that those defects were remedied by the respective contractors prior to releasing the final payments remained unchallenged.

[100] In essence, the Company's assertion that the Claimant's termination was due to his failure to carry out his responsibilities as a Quantity Surveyor and that this has caused the Company monetary losses is proven.

[101] Having considered the evidence and facts of the case in its entirety, the Court based on equity and good conscience and the substantial merit of the case without having regards to technicality and legal forms under Section 30 (5) of the Act, finds that the Company had proven on the balance of probabilities its allegations against the Claimant. The Claimant's dismissal is with just cause and excuse.

The Claimant's claim is hereby dismissed.

HANDED DOWN AND DATED 06TH OCTOBER 2021

-signed-

**(REIHANA BINTI ABD RAZAK)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR**