

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 4/4-2281/20

BETWEEN

ZURINA BINTI YUSOFF

AND

A & A TRAVEL & TOURS SDN. BHD.

AWARD NO: 1477 OF 2021

BEFORE : Y.A. TUAN AUGUSTINE ANTHONY
Chairman

VENUE : Industrial Court, Kuala Lumpur .

DATE OF REFERENCE : 07.10.2020.

**DATE OF RECEIPT
OF REFERENCE** : 13.10.2020.

DATES OF MENTION : 16.11.2020, 25.02.2021, 18.03.2021 &
06.04.2021

DATE OF HEARING : 27.04.2021 & 05.05.2021

REPRESENTATION : Puan Intan Sharina Binti Ahmad
Sharizal & Cik Amalina Binti Haris of
Messrs Amalina & Sharina, Counsel for
the Claimant.

Encik Ashmadi Othman & Encik
Muhammad Raihan Bin Lazan of Messrs
Zulpadli & Edham, Counsel for the
Company.

THE REFERENCE

This is a reference dated 07.10.2020 by the Honourable Minister of Human Resources pursuant to section 20 (3) of the Industrial Relations Act 1967 (“The Act”) arising out of the dismissal of Zurina Binti Yusoff (**“Claimant”**) by A&A Travel & Tours Sdn. Bhd. (**“Company”**) on the 27.02.2020.

AWARD

[1] The parties in this matter filed their respective written submissions dated 02.07.2021 (Claimant’s Written Submissions), 30.07.2021 (Company’s Written Submissions), 08.09.2021 (Claimant’s Written Submissions in Reply) and 17.09.2021 (Company’s Written Submissions in Reply).

[2] This Court considered all the notes of proceedings in this matter, documents and the cause papers in handing down this Award namely:-

- (i) The Claimant’s Amended Statement of Case dated 19.03.2021;
- (ii) The Company’s Amended Statement in Reply dated 06.04.2021 and the Enclosures therein;

- (iii) The Claimant's Amended Rejoinder dated 22.04.2021;
- (iv) The Company's Bundle of Documents – COB 1 and COB2;
- (v) The Claimant's Bundle of Documents – CLB1 , CLB2 & CLB3
- (vi) The Company's Witness Statement : (Amirah Aqilah Binti Faizoull) marked as COW1 – WS;
- (vii) The Company's Witness Statement : (Amir Hatim Bin Faizoull) marked as COW2-WS;
- (viii) The Claimant's Witness Statement marked as CLW-WS (1) and CLW – WS(2)

INTRODUCTION

[3] The dispute before this Court is the claim by Zurina Binti Yusoff (“Claimant”) that she had been dismissed from her employment without just cause or excuse by A&A Travel & Tours Sdn. Bhd. (“Company”) on the 27.02.2020.

[4] The Company is in the business of travel and tours, manufacturing of food products and the sales and services of food and beverages. By a

letter of appointment dated 22.04.2019, the Claimant was appointed as the Food and Beverages General Manager effective 23.04.2019 with a starting salary of RM6,000.00. The Claimant was placed on a probationary period and subsequently on the 01.01.2020, the Claimant was confirmed as a permanent employee of the Company with an increased basic salary of RM8,000.00. On the 27.02.2020, at about 10.41 p.m. the Claimant had received an email from the Company informing the Claimant that the Claimant was being dismissed from her employment with the Company with immediate effect for disobedience arising out of the Claimant's failure to attend a meeting scheduled by the Company and also for not informing her whereabouts. The Claimant was also alleged to have failed to set a meeting with the Company's client despite being warned previously whereby the Claimant had allegedly failed to cooperate with the orders given by the Company. The Claimant denies the allegation of disobedience and failure to cooperate on the orders given by the Company and now claims that she had been dismissed without just cause or excuse and prays that she be reinstated to her former position without any loss of wages or other benefits. The Company denies the Claimant's contention that the Company had dismissed the Claimant without just cause or excuse and prays that the Claimant's case be dismissed.

[5] The Claimant gave evidence under oath and remained the sole witness for her case. The Company's evidence was led by COW1 (Cik Amirah Aqilah Binti Faizoull, who is one of the director of the Company in charge of the Azizah Paste department, which is involved in the food and beverage business. The Claimant worked directly under this witness who was the Claimant's direct superior) and COW2 (Encik Amir Hatim Bin Faizoull , a director of the Company who was responsible for tour and travel division. This witness was also involved in the appointment of the Claimant as the General Manager of the Company. This witness also gave evidence on the alleged poor performance of the Claimant and her nonchalant attitude in the discharge of her duties.)

THE COMPANY'S CASE

[6] The Company's case can be summarised as follows:-

- (i) The Company admits that by a letter of employment dated 22.04.2019, the Claimant was appointed as the F&B General Manager commencing on 23.04.2019 with a basic salary of RM6 ,000.00 per month.

- (ii) The Claimant was then placed on a probationary period of three to six months from the date of her appointment as an employee of the Company.
- (iii) The Claimant according to the terms of the employment contract, at all material times was given a Key Performance Indicator (KPI) in order for the Claimant to achieve the targets.
- (iv) The Company does not dispute that the Claimant was confirmed as a General Manager under the Azizah Team (“the Azizah”) on a permanent basis with effect from 01.01.2020 with an increased basic salary of RM8,000.00 per month.
- (v) Pursuant to the letter of offer dated 22.04.2019, Claimant’s job was to follow all items in her job scope briefed by the Executive Director of the Company namely COW2 during her appointment. Claimant's job scope was given pursuant to the representation made by the Claimant of her previous working experience as well as her connection in the following areas, namely embarking as many markets as possible to reach the target promised by the Claimant, to provide detailed reports on progress of each deal with potential markets to her

immediate superior and Board of Directors (BOD), to provide detailed reports on meetings with every customer, to monitor and report on activities done by merchandiser and promoter, prepare schedule of ground works and to report and justify the budget given.

- (vi) The Claimant was made aware of the KPI from the first day she had been appointed as General Manager by the Company. Apart from that, the immediate superior of the Claimant, COW1 had from time to time during meetings and WhatsApp communication closely updated and monitored the Claimant's performance of which she failed to deliver.
- (vii) The Company states that the Claimant's dismissal from her employment with the Company was due to the Claimant's disobedience and breach of duties as the General Manager of the Company namely :-

- (a) The Claimant never submitted any written report and receipts for the groundwork done for the Company and only forecast budgets were provided;
- (b) Lulu Hypermarket and Ummah Store (M) Sdn. Bhd. or Pasaraya U-shop were the existing customers of the Company before the appointment of the Claimant. The increase on the sales in Lulu Hypermarket outlets was due to COW1's effort in sealing deals with the customer;
- (c) The Claimant's sales performance of all outlets in 2019 (from May until November) did not reach the KPI promised by the Claimant, which is to attain RM100,000.00 of sales per month;
- (d) The Claimant's frequently failed to consult with her immediate superior and BOD before making any important decisions and meetings involving customers and this happened repeatedly despite being reminded by her immediate superior;

- (e) The Claimant continuously misrepresented to various outlets despite stern reminders given by the Company.
- (viii) The Claimant caused contradiction of the sale to the hypermarket as oppose to the actual cash transaction. The Claimant was aware of the fact that some hypermarkets' transactions were in credit terms of 60-90 days while other smaller groceries (hyper-runcit) transactions occur via invoice to invoice. However, this fact was not disclosed to the Company and it only came to the knowledge of COW1 after COW1 took over the same functions after the Claimant's dismissal;
- (ix) Upon inspection made by COW1 in the various outlets, COW1 discovered that the Claimant had spent more than the approved budget which was not mentioned beforehand which also included unauthorized and unjustified expenses of the approved budget;
- (x) The Claimant had despite COW1's specific instruction that the communication with personnel in charge for Lulu Hypermarket, Encik Najmuddin should be done by email, failed to do so. This had resulted in COW1 communicating directly with Lulu

Hypermarket's personnel to discuss on the increase of price of the Azizah's cooking pastes although it should be the Claimant responsibility.

- (xi) The Company states that the Claimant had failed to discharge her duties as the General Manager of the Company and as a result the Company had to issue a show cause letter and three warning letters to the Claimant on the Claimant's failures in her job scopes.
- (xii) When the Claimant was directed to attend a meeting on 27.02.2020 at 3.00 pm with the BOD to discuss the various issues, the Claimant had failed to cooperate with the Company and had been absent from the meeting which justified the dismissal of the Claimant from her employment with the Company.
- (xiii) The Company had also discovered that the Claimant was working for another company and was selling products of that company, known as "Honey Blast" whilst still in employment with the Company without disclosing the same to the Company

which was a breach of the Claimant's terms of employment with the Company.

(xiv) The Claimant always gives excuses when she was asked for written reports and justifications of budgets on various occasions;

(xv) The Claimant had also acted against the interest of the Company amongst other when the Claimant had reformatted the Company's laptop before it was returned to the Company which had caused loss of files and important data of the Company.

(xvi) The Claimant had conducted herself in such a way that her actions were against the interest of the Company.

(xvii) The Company now contends that the dismissal of the Claimant was with just cause or excuse and prays that the Claimant's case against the Company be dismissed.

THE CLAIMANT'S CASE

[7] The Claimant's case can be summarised as follows:-

- (i) By a letter of employment dated 22.04.2019, the Claimant was appointed as the F&B General Manager commencing on 23.04.2019 with a basic salary of RM6,000.00 per month.
- (ii) The Claimant was placed on a probationary period of three to six months from the date of her appointment as an employee of the Company.
- (iii) Notwithstanding the terms of the employment contract, at all material times there was no KPI set by the Company for the Claimant to achieve the targets.
- (iv) The Claimant was confirmed as a General Manager under the Azizah Team ("the Azizah") on a permanent basis with effect from 01.01.2020 with an increased basic salary of RM8,000.00 per month.
- (v) Throughout the Claimant's employment, the Company also provided to the Claimant a Perodua Myvi as a Company car for

work purposes specifically to attend meetings for marketing purposes and was later changed to Toyota Hilux (“Hilux ”) due to the Claimant being required to carry stocks to outlets.

- (vi) In the course of the Claimant’s employment with the Company, the Claimant had performed her job functions effectively and had achieved performance above the expectation of the Company.
- (vii) The Claimant had frequently travelled for meetings and product presentations with the existing and potential buyers, managed the promotion and positioning of the Azizah’s cooking pastes, developed, implemented as well as executed strategic marketing plan and forecasts for Azizah’s cooking pastes’ business growth and strategized systematically problematic situations to find an accurate and workable solution for the Azizah Paste Department to thrive and prosper.
- (viii) The Company was fully aware of the Claimant contributions and achievements as the Claimant had from time to time updated, presented and proposed to the Company all the activities that were carried out by the Claimant.

- (ix) Despite the Claimant's dedication and contribution to the Company, the Claimant was surprised that on 27.02.2020 at 10.41 p.m., the Claimant had received an email from the Company enclosing a letter of 'Immediate Termination and Final Warning Letter' dated 27.02.2020, a 'Show Cause Letter' dated 20.01.2020, a 'First Warning Letter – Fail to Report' dated 21.01.2020, a letter on 'Second Warning – Communication Failure with Ex-Staff' dated 23.01.2020 and a letter on 'Third Warning – Failed to Notice the Company Regarding Payment Collection' dated 25.02.2020.
- (x) Pursuant to the Termination Letter, the Claimant was terminated on a 24 hour-notice on the 27.02.2020 on the following grounds:-
- (a) That the Claimant had disobediently failed to attend meeting without any concrete reasons and report the Claimant's whereabouts when inquired by Amirah and/or the Company;

- (b) The Claimant had failed to contact Lulu Hypermarket's buyer, Mr. Najmuddin ("Najmuddin") to set a meeting for the Company after warnings being given to the Claimant by way of emails and verbal communication. As such, the Claimant had failed to cooperate with the orders given by the Company.
- (xi) The Claimant states that there were no investigation and/or inquiry carried out by the Company on the above allegation of misconduct purportedly committed by the Claimant.
- (xii) In respect of the show cause Letter and all the warning letters, the Claimant states that the Show Cause Letter and all the warning letters were never issued to, received and/or acknowledged by the Claimant. It was only made known to the Claimant on the 27.02.2020 upon receiving the email on her termination from employment with the Company.
- (xiii) The Claimant denies the allegation of misconducts contained in the letter of termination issued by the Company.

- (xiv) The Claimant now contends that the dismissal of the Claimant from her employment with the Company was without just cause or excuse and that it was also procedurally unfair, against the principles of natural justice, equity and good conscience and were tainted with mala fide, victimization and unfair labour practices employed by the Company
- (xv) The Claimant now prays for an order of reinstatement to her former position in the Company without any loss of wages or other benefits.

THE LAW

Role and function of the Industrial Court

[8] The role of the Industrial Court under section 20 of the Industrial Relations Act 1967 is succinctly explained in the case ***Milan Auto Sdn. Bhd. v. Wong Seh Yen [1995] 4 CLJ 449***. His lordship Justice Mohd Azmi bin Kamaruddin FCJ delivering the judgment of the Federal Court had the occasion to state the following:-

*“As pointed out by this Court recently in ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal [1995] 3 CLJ****

344; [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s. 20 is two-fold firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error ...”

[9] The above principle was further reiterated by the Court of Appeal in the case of ***K A Sanduran Nehru Ratnam v. I-Berhad*** [2007] 1 CLJ **347** where his lordship Justice Mohd Ghazali Yusoff, JCA outlined the function of the Industrial Court:-

“[21] The learned judge of the High Court held that the Industrial Court had adopted and applied a wrong standard of proof in holding that the respondent has failed to prove dishonest intention and further stating that the respondent has not been able to discharge their evidential burden in failing to prove every element of the charge. He went on to say that the function of the Industrial Court is best described by the Federal Court in Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal [1995] 3 CLJ 344 where in delivering the judgment of the court Mohd Azmi FCJ said (at p. 352):

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”

Burden Of Proof

[10] Whenever a Company had caused the dismissal of the workman, it is then incumbent on part of the Company to discharge the burden of proof that the dismissal was with just cause or excuse. This Court will now refer to the case of ***Ireka Construction Berhad v. Chantiravathan a/l Subramaniam James [1995] 2 ILR 11*** in which case it was stated that:-

*“It is a basic principle of industrial jurisprudence that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be, either a misconduct, negligence or **poor performance** based on the facts of the case.”*

Standard Of Proof

[11] In the case of ***Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314*** the Court of Appeal had laid down the principle that the standard of proof that is required to prove a case in the Industrial Court is one that is on the balance of probabilities wherein his lordship Justice Abdul Hamid Mohamad, JCA opined:-

“Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including “theft”, is not required to be satisfied beyond reasonable doubt that the employee has “committed the offence”, as in a criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as “solid and sensible grounds”, “sufficient to measure up to a preponderance of the evidence,” “whether a case... has been made out”, “on the balance of probabilities” and “evidence of probative value”. In our view the passage quoted from Administrative Law by H.W.R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue. But, again, if we may add, these are not “passwords” that the failure to use them or if some other words are used, the decision is automatically rendered bad in law.”

EVALUATION OF EVIDENCE AND THE FINDINGS OF THIS COURT

[12] The Claimant was dismissed from her employment on the 27.02.2020 with a 24 hours notice for misconducts based on the reason contained in the Company's termination letter dated 27.02.2020 which was sent to the Claimant in an enclosure with an email on the same day at about 10.41p.m. The salient parts of the Company's termination letter issued to the Claimant is produced here in verbatim for convenience:-

"IMMEDIATE TERMINATION AND FINAL WARNING LETTER

In reference to above subject, Azizah Paste department is terminating you due to disobedience.

You have been informed earlier by your superior to attend a meeting with the board members today and have failed to attend the meeting without any concrete reason.

Your superior has enquired about your whereabouts and you have failed to report to your superior.

You also have failed to contact Lulu Hypermarket's buyer Mr Najmuddin to set a meeting for the company after so many warnings given verbally and through email to you for the past few months.

Due to these reasons, we conclude that you are disrespecting your superior and fail to corporate with orders given.

Thus , we are terminating you on a 24 hours notice.

Thank you for your service

Regards,

Amirah Aqilah Faizoull

Director of Azizah Paste Department.....”

[13] On the face of this termination letter dated 27.02.2020, it can be deciphered by this Court that this termination letter has all the ingredients that satisfies this Court that the Company had engaged in a blatant unfair labour practice and victimisation of the Claimant. It is noteworthy to state here that any decision that is reached by a deciding body must reflect fairness in its approach and action and that is one of the main reason why so much emphasis is given to a proper due process before a decision is made or a conclusion is arrived. Due processes that reflects just and fair treatment of an accused person will often yield just results. It will be useful at this stage for this Court to remind parties what is expected of companies or employers who have

undertaken disciplinary process against an employee especially one that leads to the dismissal of the employee. This Court will now make further reference to the recent decision in the case of ***Toh May Fook v Menang Development (M) Sdn. Bhd. (2019) 1 ILR 449*** to drive home the point that there is something seriously amiss in the manner in which the Company had conducted itself in dismissing the Claimant from her employment. The Industrial Court in the case of ***Toh May Fook (supra)*** had the occasion to state that :-

“[33] The two essential elements of natural justice are:

(i) The rule against bias, and

(ii) That of hearing both sides.

[34] The rule against bias simply means that a CEO cannot be judge, jury and executioner and the second rule means that the employee must be given an opportunity to be heard.

[36] As said earlier, although non-compliance with the Rules of Natural Justice is not fatal, but if Companies want the Industrial Court to support their decisions then they must show that they have complied with the fundamental Rules of Natural Justice, which ensures fairness, which is the basis of the adjudication conducted by the Industrial Court under the Industrial Relations Act 1967.”

[14] Azizah Paste Department is only a department in the Company. The department by itself does not have the power to dismiss the Claimant from employment with the Company. At most, the department can only lodge a complaint against the Claimant for her misconduct and that complaint must be dealt with by Company and in the process must show that the Company adheres to the principles of natural justice. So when the termination letter notified the Claimant that “Azizah Paste department” is terminating her for disobedience, there was something clearly amiss in the decision making process of Company for allowing the department to decide on the dismissal of the Company’s employee from employment.

[15] Further this Court had taken notice of the fact that this letter was signed by COW1 who is the head of the Azizah Paste department. COW1 is also the immediate superior of the Claimant. COW1 is also the complainant of the alleged misconducts of the Claimant. COW1 who was the complainant was also the prosecutor so to speak and the person who decided to terminate the Claimant. The evidence before this Court shows clearly that the decision to terminate the Claimant from her employment was undertaken by COW1 solely, arbitrarily and summarily. COW1 was the person who complained about the alleged misconducts

of the Claimant for acts which were done on the 27.02.2020 and the very same evening COW1 had prepared the alleged charges of misconduct and based on those charges of misconduct, COW1 summarily dismissed the Claimant on the very same day at about 10.41 pm. To dismiss the Claimant at 10.41 pm was indeed at odd and unusual hour of the day, reflecting the attitude and character of COW1 who had acted in an unusually hasty and brash manner. COW1 did all of this leading to the dismissal of the Claimant on the 27.02.2020 without even giving the Claimant an opportunity to offer any reasons in defence of the purported misconducts.

[16] This Court must also state here that the charges contained in the termination letter were also vague and unclear and which had not condescended upon the relevant particulars that can offer the Claimant an opportunity to respond with necessary particulars in defence. In any event the formulating of these badly worded charges of misconduct was an exercise in bad faith to victimise the Claimant. The very purpose of framing the charges of misconduct is to allow the alleged guilty party or in this case the Claimant to respond to it adequately but here the Company and in particular COW1 had framed the charges in such a way and manner so as not give the Claimant any chance to respond which brings this Court to ask the Company as to why even trouble itself to

frame the charges if the intention is to dismiss the Claimant summarily from employment without giving the Claimant an opportunity to respond to the charges of misconduct.

[17] From the evidence led in this Court, it can be seen that COW1 was the person who was singlehandedly responsible for the dismissal of the Claimant from her employment. COW2 gave evidence in Court that he was somewhat vaguely aware of the problems in the working relationship between the Claimant and COW1 but was however unaware of the exact details of it. COW2 was also unaware of any written complaints or warning given to the Claimant when he admitted the same in cross examination. COW2 was also not involved in the dismissal of the Claimant which was solely decided by COW1. The Company also did not produce any other witnesses who could testify the alleged misconducts of the Claimant.

[18] This Court had also analysed the evidence of the Claimant who had testified that she had not committed the alleged misconducts of disobedience, disrespecting or failing to execute the orders given. There may be occasions when directions were given to the Claimant which may not have been executed to the fullest satisfaction of the Company but that does not amount to disobedience warranting a summary

dismissal from employment especially when the Claimant had sufficient and acceptable reasons to justify the Claimant's course of action.

[19] On the charge of failing to attend the board meeting and failing to report the Claimant's whereabouts, the Claimant had given cogent evidence that on the 27.02.2020, when she was informed by COW1 at about 8.35 a.m. by way of a WhatsApp notification that a board meeting had been scheduled at about 3.00 or 4.00 pm, the Claimant had replied that it was "Noted". However as the Claimant was on a scheduled meeting with potential customers of the Company on the same day which COW1 was fully aware, the Claimant had to attend the meeting and was unable to conclude the meeting in time to attend the board meeting which was scheduled with a very short notice given to the Claimant. The Claimant had then informed the same to COW1 and had also apologised. COW1 then had informed the Claimant to attend the board meeting on the 28.02.2020 but before that could be done, COW1 had sent a letter which summarily dismissed the Claimant. This Court in assessing the evidence of COW1 and the Claimant finds the Claimant's evidence is convincing as opposed to COW1's evidence which was riddled with inconsistencies.

[20] On the second charge of failing to contact Lulu Hypermarket's buyer Encik Najmuddin to set a meeting for the Company, the Claimant had also been able to adequately answer and explain why this alleged misconduct was without basis. The Claimant had given evidence that the meeting with Encik Najmuddin was to discuss about the Azizah's cooking pastes and Encik Najmuddin was the only personnel in charge for that matter and he was on leave and had returned to India and will be away for 3 months and therefore it was impossible to fix a meeting with Encik Najmuddin.

[21] It is this Court's view that COW1 was adamant and fixated on removing the Claimant from the Company and no explanations or reasons from the Claimant would have changed COW1's mind in the course of action that COW1 had decided to take against the Claimant. This Court after examining all the accompanying alleged show cause letter and warning letters issued to the Claimant and which were emailed to the Claimant on the 27.02.2020 together with the termination letter must conclude that these documents were manufactured on or about the 27.02.2020 by the Company with COW1's active participation in order to victimise the Claimant. The Claimant had given evidence that she had not seen the alleged show cause letter and warning letters prior to the 27.02.2020 and this Court has no reason not to believe her. The conduct

of the Company going to this extent to victimise the Claimant is something that this Court must frown upon.

[22] Having analysed the entire evidence presented in this Court, this Court is of the view that the Company's real reason for dismissing the Claimant from her employment may well be the Company's declining business and its inability to pay the Claimant her wages as agreed.

[23] The evidence before this Court shows that the Claimant was confirmed on the 01.01.2020 after her successful probationary period and her salary was increased from RM6,000.00 to RM8,000.00 upon her confirmation. The confirmation and substantial salary increment signifies that the Claimant had performed her duties well and to the satisfaction of the Company for otherwise why the need to confirm the Claimant and give her a substantial increment?

[24] Unexpectedly and without any proper documented proof, the Company in slightly more than a month after the confirmation of the Claimant had by way of a letter dated 25.02.2020, abruptly demoted the Claimant and reduced the Claimant's salary drastically from RM8,000.00 to a mere RM3,500.00. The reason for such an unwarranted act on part of the Company was due to the Company facing cash flow problems and

financial difficulties. The Claimant was told that her new and reduced salary will take effect from the 01.03.2020 but even before that could take effect, on the 27.02.2020, for reasons which were totally unjustified the Company summarily dismissed the Claimant. The Company's arbitrary and erratic course of action taken that had severely affected the Claimant and her livelihood is very disconcerting. Before this Court , the Company had also attempted to give various other reasons why the dismissal of the Claimant from her employment was with just cause or excuse ranging from her poor performance, inability in the achievement of the KPI and other frivolous issues that were not even encapsulated in the termination letter but this Court is of the view that these matters raised were mere afterthoughts of the Company to bolster its case against the Claimant in this Court which did not sway or convince this Court.

[25] This Court must now conclude that the Company had failed to prove the misconducts that it had alleged against the Claimant as these charges of misconduct are frivolous in nature and lacks real substance. The conduct of the Company also shows that there was bad intention when it decided on the dismissal of the Claimant from her employment.

[26] Pursuant to Section 30(5) of the Industrial Relations Act 1967 and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal forms and after having considered the totality of the facts of the case, the evidence adduced and by reasons of the established principles of industrial relations and disputes as stated above, this Court finds that the Company had failed to prove on the balance of probabilities that the dismissal of the Claimant was with just cause or excuse.

REMEDY

[27] This Court having ruled that the Claimant was dismissed without just cause or excuse, will now consider the appropriate remedy for the Claimant.

[28] The Claimant had given unchallenged evidence that she was a confirmed and permanent employee of the Company. The Claimant commenced employment with the Company on the 23.04.2019. The Claimant was dismissed from her employment with the Company effective 27.02.2020. The Claimant had thus served the Company for a period of less than one full year.

[29] The Claimant, in stating that her dismissal from employment with the Company was without just cause or excuse, prays to this Court for reinstatement to her former position without any loss of wages, allowance, seniority and privileges. Considering the factual matrix of this, it is this Court's view that reinstatement of the Claimant to her former position in the Company is not a suitable remedy in the circumstances of this case especially so when it is apparent that the working relationship between COW1 and the Claimant does not reflect industrial harmony.

[30] As such the appropriate remedy in the circumstances of this case must be compensation in lieu of reinstatement provided the Claimant is entitled for compensation in lieu of reinstatement wherein the Claimant must satisfy this Court on the usual criterion of years of service in the Company wherein this Court had consistently awarded compensation in lieu of reinstatement of one month of the last drawn salary for every full year of service completed by any Claimant. The Claimant here is also entitled for back wages in line with Section 30(6A) Industrial Relations Act 1967 and the factors specified in the Second Schedule therein which states:-

"1. In the event that backwages are to be given, such backwages shall not exceed twenty-four months' backwages from the date of dismissal

based on the last-drawn salary of the person who has been dismissed without just cause or excuse;”

[31] The Claimant’s last drawn salary per month was RM8,000.00.

[32] Equity, good conscience and substantial merits of the case without regard to technicalities and legal forms remains the central feature and focal point of this Court in arriving at its decision and these principles will be adhered by this Court at all times leading to the final order of this Court.

[33] This Court is further bound by the principle laid down in the case of ***Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 3 CLJ 541*** where his lordship Justice Steve Shim CJ (Sabah & Sarawak) in delivering the judgment of the Federal Court opined:-

*“In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, 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 of 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 backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision-making process”.

(emphasis is this Court’s)

[34] This Court must take into account the post dismissal earnings of the Claimant in order to make an appropriate deduction from the back wages to be awarded. There is no evidence before this Court that the Claimant had any post dismissal earnings or income.

[35] Having considered all the facts of case on the appropriate sum to be awarded and after taking into account that there is no post dismissal earnings or income of the Claimant, this Court hereby orders that the Claimant be paid back wages of the last drawn salary of RM8,000.00 for 15 months. Since the Claimant had served the Company for a period of less than one full year, there will be no award for compensation in lieu of reinstatement. Thus the amount ordered by this Court will therefore be :-

(i) Backwages ordered:

RM8,000.00 x 15 months = RM 120,000.00

(ii) Compensation in lieu of Reinstatement: No amount ordered.

Total amount ordered by this Court: RM 120,000.00

FINAL ORDER OF THIS COURT

[36] It is this Court's order that the Company pays the Claimant a sum of **Ringgit Malaysia One Hundred Twenty Thousand (RM 120,000.00)** only less statutory deduction (if any) within 30 days from the date of this Award.

HANDED DOWN AND DATED THIS 7th DAY OF OCTOBER 2021

-signed-

**(AUGUSTINE ANTHONY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR**