

**IN THE INDUSTRIAL COURT OF MALAYSIA**

**CASE NO.: 16/4-63/21**

**BETWEEN**

**CHEONG SIN FANG**

**AND**

**SDP PACKAGING SDN. BHD.**

**AWARD NO. : 890 OF 2022**

(Award handed down by Tuan Paramalingam a/l J. Doraisamy)

**BEFORE : Y.A. PUAN NOOR HAYATI BINTI HAJI MAT**  
**- Chairman (Sitting Alone)**

**VENUE : Industrial Court of Malaysia, Johor Bahru**

**DATE OF REFERENCE : 08.12.2020**

**DATES OF MENTION : 09.2.2021; 11.05.2021; 15.07.2021; 01.03.2022;**  
**09.03.2022 & 30.03.2022**

**DATE OF HEARING : 13.01.2022**

**REPRESENTATION : Mr. Adrian Jayaraj Paul**  
**Messrs. H T Lim & Partners**  
**Counsel for the Claimant**

**Ms. Leong May May**  
**(Financial Controller)**  
**Representative from for the Company**

## **REFERENCE :**

This is a reference made under Section 20 (3) of the Industrial Relations Act 1967 (Act 177), arising out of the dismissal of **Cheong Sin Fang** (hereinafter referred to as “*the Claimant*”) by **SDP Packaging Sdn. Bhd.** (hereinafter referred to as “*the Company*”) on 3 July 2020.

## **AWARD**

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant’s complaint of dismissal by the Company on 3 July 2020.

### **I. PROCEDURAL HISTORY**

[2] The Court received the letter pertaining to the Ministerial reference under Section 20(3) of the Industrial Relations Act 1967 on 4 January 2021.

[3] The matter was fixed for mention on 9 February 2021, 11 May 2021, 15 July 2021, 1 March 2022, 9 March 2022 and 30 March 2022. 7

[4] The trial proceeded before the then learned Chairman of Court No. 16 (Johor Bahru), Puan Noor Hayati Binti Haji Mat, on 13 January 2022.

**[5]** Due to the learned Chairman Puan Noor Hayati Binti Haji Mat's elevation to the High Court of Malaya as a Judicial Commissioner on 4 February 2022, the learned President of the Industrial Court instructed me (i.e. Chairman of Court 22, Kuala Lumpur) to hand down an Award for this case.

**[6]** After perusing the pleadings, the documents, the witness statements, the notes of proceedings as well as the written submissions (together with the bundles of authorities) filed by the parties to this matter, I hereby hand down the Award as per the instructions of the learned President of the Industrial Court.

## **II. FACTUAL BACKGROUND**

### **a. The Claimant**

**[7]** The Claimant commenced her employment with the Company on 3 April 2017 as an Accounts Clerk in the Accounts and Finance Department, earning a basic salary of RM1,800.00 per month.

**[8]** The Claimant received a letter dated 2 January 2018 wherein the Claimant was promoted to the position of Accounts Assistant in the Accounts and Finance Department, effective from 1 January 2018. The said promotion was based on the Letter of Appointment dated 5 March 2018. The monthly salary of the Claimant after the said promotion was RM2,300.00 per month.

**[9]** The Claimant thereafter was promoted for the second time to the position of Accounts Officer in the Accounts and Finance Department effective from 1 August 2018. The Claimant held this position until the day she was dismissed from her employment. The last drawn salary of the Claimant at the Company was RM3,090.00.

**[10]** Sometime at the end of May 2020, one Yang Maosen (Deputy General Manager of the Company), offered the Claimant a transfer from her current position as an Accounts Officer in the Accounts and Finance Department to the position of a Storekeeper in the Purchasing and Store Department. The reason given by Yang Maosen for the said transfer was that no one in the Company wants to take over the position of a storekeeper. He also told the Claimant that should she refuse to accept the transfer, her services with the Company will be terminated. Thus, it was in fact an ultimatum given to the Claimant in the guise of an offer.

**[11]** The Claimant rejected the offer to transfer based on the following reasons:-

- i. the job scope for the position of a storekeeper offered by the Company is far more different as compared to the job scope of the Claimant as an Accounts Officer during that time at the Company;
- ii. the transfer was not within the department (category) but from one department (category) to another department (category);
- iii. the Claimant applied for the job at the Company in the first instance to be employed at the Accounts and Finance Department as an Accountant; and

- iv. there will be a drastic reduction in salary and drastic change in the present employment of the Claimant in the Company.

[12] Following the Claimant's rejection of the offer to transfer, the Company issued a Termination Notice dated 4 June 2020 to the Claimant.

### **III. THE FUNCTION OF THE INDUSTRIAL COURT**

[13] The role of the Industrial Court pertaining to a reference under section 20 (3) of the Industrial Relations Act 1967 is to ask itself a question whether there was a dismissal; and, if so, whether it was with or without just cause or excuse (**Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 MLJ 92**).

### **IV. ISSUES TO BE DECIDED**

[14] The issues to be determined in this case are:-

- (i) what was the reason for the Claimant's termination from her employment;
- (ii) whether the termination of the Claimant's employment by the Company was made with just cause or excuse.

### **V. THE COURT'S FINDINGS AND REASONS**

[15] The Claimant contends that she had been constructively dismissed from her employment based on the ground that her employment contract had been breached by the Company when she was given an ultimatum to accept the offer to transfer from

her position as an Accounts Officer in the Accounts and Finance Department to the position of Storekeeper in the Purchasing and Store Department.

[16] A perusal of the documents tendered before the Court however shows that the Claimant was in fact terminated from her employment *vide* the Termination Notice dated 4 June 2020 (*at p. 13 of CLB*).

[17] Constructive dismissal usually occurs where the employer, at times through the most subtlest of means instead of outrightly dismissing the employee, causes the Claimant to be so uncomfortable and unbearable in his/her employment with a view to drive him/her out of his/her employment through his/her own volition. In **Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9** the Court of Appeal described constructive dismissal as follows:-

*“A reading of the pleaded case for the parties resolved the issue that fell for adjudication before the Industrial Court into what the profession has come to call as a "constructive dismissal". There is no magic in the phrase. It simply means this.*

***An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organisation. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman. That is what happened in Wong***

***Chee Hong (ibid). Alternatively, he may take steps to reduce the workman in rank by giving him fewer or less prestigious responsibilities than previously held. Generally speaking, he will make life so unbearable for the workman so as to drive the latter out of employment. In the normal case, the workman being unable to tolerate the acts of oppression and victimisation will tender his resignation and leave the employer's services. The question will then arise whether such departure is a voluntary resignation or a dismissal in truth and fact.***

*In the normal case, an employer either dismisses the servant for cause or terminates the employment under a contractual provision that provides for notice of termination. As a matter of law, the Industrial Court is unconcerned with labels. It does not matter that the parties refer to the particular severance of the relationship as a termination or a dismissal. It is for the Industrial Court to make the determination. Having found that there was in fact a dismissal or the bona fide exercise of the contractual power to terminate, the Industrial Court must, in the former case, decide whether the dismissal was for just cause or excuse. If, on the other hand, it comes to the conclusion that there was a bona fide termination, then cadit quaestio”.*

(Emphasis added)

**[18]** However, in this case, the Claimant did not walk out from her employment claiming constructive dismissal as a result of the alleged breach of the employment contract by the Company. Instead, it was the Company who terminated the Claimant's employment *vide* the Termination Notice dated 4 June 2020. The burden of proof is thus on the Company to prove that the termination of the Claimant's employment was done with just cause or excuse.

**[19]** It is the Claimant's contention that the meeting whereby the offer to transfer the Claimant from the position of Accounts Officer in the Accounts and Finance Department to the position of Storekeeper in the Purchasing and Store Department was between her and Yang Maosen.

**[20]** The Company however failed to produce the said Yang Maosen before this Court to explain the reasons for the Company's decision to transfer the Claimant to a different position in a different department in the Company. The Company's Statement In Reply states that the reason for the transfer was that the Claimant was not performing satisfactorily and had been negligent.

**[21]** Even though the Company has the prerogative to transfer its employees, it must however be done in a *bona fide* manner. In this case, the Claimant was being transferred to a position which was unfamiliar to her and which she never applied from the very beginning with the Company. The said transfer also entailed a position and salary which was lower than what she was holding and receiving at the material point in time. There was a material change in the conditions of her service in the Company.



[22] In the case of **Chan Phaik Leng v. Mahkamah Perusahaan Malaysia & Anor**

[2019] 1 LNS 1240 it was held by Evrol Mariette Peters JC:-

*"It is trite law that the management's contractual right to transfer/ re-designate employee is subject to the restrictions that the transfer must not result in a change in the conditions of service to the detriment of the employee. **The power to transfer/ re-designate an employee from one job to another is not unfettered.***

*This is clear from the case of Ladang Holyrood v. Ayasamy Manikam & Ors [2004] 2 CLJ 697, in the words of Arifin Zakaria JCA at page 703:*

*It is well established in Industrial Law that the right to transfer an employee from one department to another or from one post of an establishment to another or from one branch to another or from one company to another within the organisation is the prerogative of the management and the Industrial Court will ordinarily not interfere. But if the transfer is actuated with improper motive, it will attract the jurisdiction of the Court. The power to transfer is, therefore, subject to, according to Ghaiye's Misconduct in Employment the following well recognised restrictions:*

- (a) There is nothing to the contrary in the terms of employment.*
- (b) The management has acted bona fide and in the interests of its business;*
- (c) The management is not actuated by any indirect motive or any kind of mala fide;*

(d) *The transfer is not made for the purpose of harassing and victimising the workmen; and*

(e) *The transfer does not involve a change in the conditions of service*

***The Second Respondent's contractual right to re-designate the Applicant, therefore, is subject to the restrictions that the transfer must not result in a change in the conditions of service to the detriment of the employee".***

(Emphasis added)

[23] Due to the failure of the Company to produce Yang Maosen as a witness before the Court, the reasons for the transfer could not be deduced. The Company instead produced as its sole witness one Tan Jieleen (COW-1) who was the Warehouse & Logistic Manager. COW-1 was neither from the same department as Accounts and Finance Department or the Purchasing and Store Department. She did not have any personal knowledge of the events that transpired between Yang Maosen and the Claimant, in particular with regards to the transfer.

[24] Yang Maosen's ultimatum to the Claimant to either accept the offer of transfer or be terminated from employment reeks of *mala fide* intention.

[25] The Company, *via* the sole testimony of COW-1, was unable to justify the termination of the Claimant's employment from the Company. The Company's pleaded case of unsatisfactory work performance and negligence on the part of the Claimant also remains unproven.

[26] Under the circumstances, the Court finds that the Claimant's termination by the Company was not made *bona fide*.

## **VI. The Remedy**

[27] The Court finds that an order for reinstatement is inappropriate taking into account the circumstances of the case. The Company clearly does not wish to keep the Claimant in its employment.

[28] The Claimant had pleaded in her Statement of Claim that her last drawn salary was RM3,090.00.

[29] The Claimant is entitled to compensation *in lieu* of reinstatement, at the rate of one month's salary for each year of service. The Claimant commenced her employment on 3 April 2017 and was terminated from her employment on 3 July 2020. She had thus been in employment for 3 years and 3 months. The Claimant is entitled to compensation *in lieu* of reinstatement for a total sum of RM9,270.00, i.e. RM3,090.00 x 3 months.

[30] Para. 1 of the Second Schedule of the Industrial Relations Act 1967 provides that in the event that backwages are to be given, such backwages shall not exceed 24 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. Claimant was terminated on 3 July 2020 and the hearing of this case was completed on 13 January 2022. Thus, the Court allows a total of 18 months' backwages, amounting to RM55,620.00, i.e. RM3,090.00 x 18 months.

[31] After the termination from her employment with the Company, the Claimant eventually found a job as an Accounts Assistant in Gopalpron PLC. As such, the Court will impose a post-dismissal deduction of 20% on the amount of backwages awarded.

## VII. Award

[32] The Court awards and directs that the Company pay to the Claimant a total sum of **RM53,766.00**, which is derived from the following calculation:-

(i)	Compensation <i>in lieu</i> of reinstatement		
	RM3,090.00 x 3 months	...RM	9,270.00
(ii)	Backwages		
	RM3,090.00 x 18 months	...RM	55,620.00
(iii)	Less post-dismissal deduction of 20%	...RM	(11,124.00)
<b>Total</b>		<b>... RM</b>	<b>53,766.00</b>
			=====

**[33]** The payment of the award sum, subject to statutory deductions (if any), must be made by the Company to the Claimant's solicitors, Messrs. H T Lim & Partners, within 30 days from the date mentioned at the bottom of this Award.

**HANDED DOWN AND DATED THIS 17<sup>TH</sup> DAY OF MAY 2022**

**-signed-**

**(PARAMALINGAM A/L J. DORAISAMY)  
CHAIRMAN  
INDUSTRIAL COURT, MALAYSIA  
KUALA LUMPUR**