

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 4/4 - 1129/21

BETWEEN

RUTH ANTONY MARY A/P RICHARD ISRAEL

AND

HAPPYDAYS CREATIVE LEARNING CENTRE SDN.BHD

AWARD NO: 234 OF 2023

<u>BEFORE</u>	: Y.A. TUAN AUGUSTINE ANTHONY Chairman
<u>VENUE</u>	: Industrial Court of Malaysia, Kuala Lumpur.
<u>DATE OF REFERENCE</u>	: 17.03.2021.
<u>DATE OF RECEIPT OF REFERENCE</u>	: 21.04.2021.
<u>DATES OF MENTION</u>	: 21.05.2021, 20.12.2021, 14.02.2022, 14.04.2022, 27.05.2022, 23.06.2022, 03.08.2022, 02.11.2022, 16.11.2022 & 07.12.2022.
<u>DATE OF HEARING</u>	: 26.09.2022.

REPRESENTATION

: Claimant - present (Self Representation)

: Mr. Rejinder Singh of Messrs Rejinder Singh & Associates – Counsel for the Company.

THE REFERENCE

This is a reference dated 17.03.2021 by Honourable Minister of Human Resources pursuant to section 20(3) of the Industrial Relations Act 1967 (“The Act”) arising out of the alleged dismissal of **RUTH ANTONY MARY A/P RICHARD ISRAEL** (“Claimant”) by **HAPPYDAYS CREATIVE LEARNING CENTRE SDN.BHD.** (“Company”) on the 05.04.2020.

AWARD

[1] Pursuant to the directions of this Court, the parties in this matter filed their respective submissions dated 17.10.2022 (Claimant’s written submissions), 17.10.2022 (Company’s written submissions), 31.10.2022 (Claimant’s written submissions in reply) and 02.12.2022 (Company’s 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 Statement of Case dated 21.05.2021 and the Annexures therein;
- (ii) The Company's Statement in Reply dated 14.01.2022;
- (iii) The Claimant's Rejoinder dated 04.02.2022 and the Annexures therein;
- (iv) The Company's Bundle of Documents – COB;
- (v) The Claimant's Witness Statement - CLW – WS;
- (vi) Company's Witness Statement - COW- WS (Norliza Binti Mohd Salleh Khan);

INTRODUCTION

[3] The dispute before this Court is the claim by Ruth Antony Mary a/p Richard Israel (Claimant) that she had been dismissed from her employment without just cause or excuse by HappyDays Creative Learning Centre Sdn Bhd (Company) on the 05.04.2020.

[4] The Company's core business is early childhood learning activities. It is the Claimant's version that the Company appointed her as a part time trainer in March 2011 and that the Claimant had progressed to be a full time principal of the Company effective 2012 and continued working for the Company until her termination from employment with the Company on the 05.04.2020. The Claimant's last drawn salary was RM3,500.00. The Claimant claims that the Company had terminated her on the 05.04.2020 without any prior notice and the Claimant 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 and other benefits. The Company on the other contends that the Company with its former shareholders and directors intended to cease the business of the Company but the Claimant having knowledge of the potential cessation of

the business of the Company had pleaded with the new shareholders to carry on the business in the interest of the Claimant and other employees. Despite the Company having new shareholders on or about February 2020 to revive the learning centre unfortunately one month thereafter the Government of Malaysia announced a movement control order (MCO) due to the COVID 19 Pandemic during which time the Company had only 10 children and was totally cash strapped. The Claimant who principally operated and/or managed the Company's learning centre had full knowledge of the financial situation of the Company wherein the Company could no longer sustain itself. Further when the MCO was announced in March 2020, due to health issues and other concerns, the parents had stopped sending any children to the centre operated by the Company and the Company had no income at all. It was during this time the Company through the Claimant being the principal of the Company's learning centre had notified all employees wherein termination letters were issued to all employees. The Company further states that the Claimant was in effect not terminated by the Company on the 05.04.2020 as alleged by the Claimant and as such the Claimant's contention that she was dismissed from employment on the 05.04.2020 without just cause or excuse must fail and hence the Company 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 adduced through COW (Norliza Binti Mohd Salleh Khan who is the director of the Company and who states that the Claimant had appealed to her to continue the operation of the Company's learning centre upon having knowledge that the previous management had decided to cease the operation wherein COW had taken over the business on account of the Claimant's persuasion)

The Company's Case

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

- (i) The Company states that the Company with its former shareholders and directors wanted to cease the business of the Company;
- (ii) The Claimant upon having knowledge of the potential cessation of the business of the Company had pleaded with the new shareholders to carry on the business in the interest of the Claimant and other employees;

- (iii) The Company with its new shareholders on or about February 2020, upon the appeal from the Claimant had taken steps to carry on the business of the Company;
- (iv) On or about February 2020, a month before the Government of Malaysia's announcement of a movement control order (MCO) during to the COVID 19 Pandemic, the Company had no only 10 children and was totally cash strapped;
- (v) The Claimant who principally operated and/or managed the Company's learning centre had full knowledge of the financial situation of the Company wherein the Company could no longer sustain itself;
- (vi) When the MCO was announced in March 2020, due to health issues and other concerns, the parents had stopped sending any children to the learning centre operated by the Company and the Company had no income at all;

(vii) On or about 05.04.2020 the Company through the Claimant had notified all employees that due to COVID 19 the Company had no alternative but to close its business wherein the termination letters was issued to all employees;

(viii) The Company further states that the Claimant was in effect not terminated by the Company on the 05.04.2020 as alleged by the Claimant and as such the Claimant's contention that she was dismissed from employment with the Company on the 05.04.2020 without just cause or excuse must fail and hence the Company prays that the Claimant's case be dismissed.

The Claimant's Case

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

(i) The Claimant was employed by the Company as a part time trainer in March 2011;

- (ii) The Claimant had progressed to be a full time principal of the Company effective 2012 and continued working for the Company until her termination from employment with the Company on the 05.04.2020;
- (iii) The Claimant's last drawn salary was RM3,500.00;
- (iv) The Claimant was terminated from employment by the Company on the 05.04.2020 without any prior notice although the Company was operational;
- (v) The Company had terminated the Claimant from employment without following the laws of the country;
- (vi) The Company had used COVID 19 pandemic as the primary cause for her termination from employment with the Company;

(vii) The Company's action in terminating the Claimant was an abuse of authority wherein the Claimant had been unfairly deprived of her livelihood;

(viii) The Claimant now claims that she had been dismissed without just cause or excuse from her employment with the Company and prays that she be reinstated to her former position without any loss of wages and 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.”

[10] It will not be complete this far if this court fails to make reference to the decision of the Federal Court in the case of ***Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30*** where His Lordship Raja Azlan Shah, CJ (Malaya) (as HRH then was) opined:

“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, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry 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.”

Burden Of Proof

[11] 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/ 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.*

Burden of proof in cases of where the dismissal is disputed.

[12] The case of ***Weltex Knitwear Industries Sdn. Bhd. v Law Kar Toy & Anor*** (1998) 1 LNS 258/ 91998) 7 MLJ 359 is relevant on the role of

this Court when the dismissal itself is disputed by the Company. In this case his lordship Justice Haji Abdul Kadir Bin Sulaiman J opined :-

*“..Next is the burden of proof on the issue of forced resignation raised by the first Respondent. The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is prima facie done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge. **However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not at all arise:** (emphasis is this Court’s).*

[13] Where the dismissal from employment itself is disputed by the Company the burden of proof will shift to the Claimant to prove that she had been dismissed by the Company from her employment before this Court can proceed to determine whether that dismissal if proven amounts to a dismissal without just cause or excuse.

Standard Of Proof

[14] 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

[15] The dispute before this Court is the claim by Claimant that she had been dismissed from her employment without just cause or excuse by Company on the 05.04.2020. The Claimant too had stated in her statement of case and further in her submission that the issue before this Court is the Claimant's termination from employment that was carried out by the Company without prior notice. Although the Company had stated in the Statement in Reply at paragraph 8 that termination letters were issued to all employees, it is unclear upon reading the pleadings of the parties whether this termination letter issued applied to the Claimant too as there are other statements contained in the pleadings that suggest that the Claimant was in continuous employment with the Company even after the alleged date of the termination of the Claimant from employment on the 05.04.2020.

[16] The Claimant at paragraph 9 of the Statement of Case had stated that she was terminated from employment in April 2020 but at paragraph

10 of the Statement of Case had further stated that she had been receiving subsidized wages from the Company until May 2020. The Claimant had further stated that the Company had failed to pay the June subsidized wages by adding the same to her basic salary. It is noteworthy to state here that the wage subsidy programme commonly known as “Program Subsidi Upah” is a Government initiative to subsidize the wages of employees in order to ensure no loss of employment of the employees with the Company during the COVID 19 Pandemic which subsidy was made available for a limited time.

[17] This Court upon reading the pleadings filed in Court had observed that although the Company had not expressly stated that it disputes the Claimant’s termination from employment on the 05.04.2020, a complete reading of the pleadings filed in this Court makes it abundantly clear that the Claimant’s purported termination from employment on the 05.04.2020 is in dispute. Based on the pleadings, the issue of the termination of the Claimant from employment on the 05.04.2020 being in dispute had not taken anyone by surprise especially the Claimant. Further to the pleadings filed herein, evidence was adduced in Court particularly during cross

examination of the Claimant on the issue relating to the Claimant's termination from employment on the 05.04.2020.

[18] The Company's Statement in Reply also states that the Claimant had on the 06.04.2020, being one day after the alleged termination from her employment had requested the Company to apply for wage subsidy from the government which the Company had applied for and had paid to the Claimant.

[19] It is this Court's view that when the pleadings are clear upon the proper reading on the issues that needs to be determined and where a body of evidence was let in without any objection by any parties, then this Court must analyse and determine the issues at hand based on the pleaded case and the evidence adduced in this Court (***please see Kong Mei Fei v Daehan Rehabilitaion Services Sdn Bhd [2021] 4 ILR 249***).

[20] Now this Court must state here that as the termination of the Claimant from her employment on the 05.04.2020 is in dispute, it becomes incumbent on part of the Claimant to prove that she was indeed dismissed

from employment on the 05.04.2020 before this Court can consider whether that dismissal (if any) was one that was without just cause or excuse.

[21] Before this Court proceeds to analyse the contents of the alleged dismissal letter dated 05.04.2020, it will be useful to state here in brief the evidence adduce through COW on behalf of the Company. COW gave evidence that the Company's core business is as an early childhood learning centre housed at a premises to which COW was the landlord. The previous shareholders of the Company had notified COW of their intention to cease business of the Company and the Claimant upon having knowledge of the impending cessation had appealed to COW to take over the business which COW did on the 03.02.2020. The following month the government declared a MCO. Further evidence before this Court shows that the Claimant being the principal of the Company's business of child learning centre was involved in most administrative and management matters of the centre and all or substantial communications of the business had or will go through to others with her full knowledge.

[22] Due to the MCO, the business of the Company which was not at all profitable, collapsed further which had caused the Company to issue termination letters to all its employees wherein a vague letter dated 05.04.2020 was issued to all “teachers”, “staffs” and “aunties” without mentioning their names. This letter states that the reason for the termination of all employees from employment with the Company was due to the COVID 19 pandemic. Conspicuously missing in the said letter dated 05.04.2020 was any reference to the principal of the learning centre of the Company being the Claimant herself and any information in relation to her termination from employment with the Company .

[23] It is the Claimant’s case that the Company had terminated the Claimant on the 05.04.2020 without prior notice but the Company had denied the Claimant’s allegation that the Claimant was dismissed without prior notice on the 05.04.2020. When evidence was led in Court on the termination letters issued to all staffs, it became apparent that not only the Claimant’s version that she was terminated without prior notice was wholly untruthful but far from it, it was revealed that the letter dated 05.04.2020 was in actual fact prepared and issued by the Claimant herself to all the staff except to the Claimant herself and it is for this reason this termination

letter was not specifically addressed to the “Principal” which the Claimant was. The Claimant’s own evidence in the form of the Claimant’s own document at “Exhibit F” annexed to the Claimant’s Statement of Case confirms this. For convenience the salient part of the WhatsApp communication between COW and the Claimant is reproduced here in verbatim which states :-

“Ruth

I hope you n staff appreciate the best we/HD can do. After you sent the letter of termination on behalf of HD in early April (4th I think) to staffs HD cud just close the center n business n don’t need to bother anymore But for the sake of you , staff , we r still paying from the help of the Govt. Thank you Msia”

[24] The above evidence was further fortified by the Claimant’s own email dated 06.04.2020 wherein the Claimant had sent this email with the termination letter issued in the Company’s letter head to other staff excluding her. Further to the above, the Claimant had on the 07.04.2020 sent another email to COW informing her that she had done all preparatory work for the Company in order for the employees of the Company which includes the Claimant to apply the wage subsidy from the government through the **“Program Subsidi Upah Perkoso Pakej Prihatin PKS”**. It is

quite unthinkable for the Claimant to claim that she was terminated from her employment on the 05.04.2020 without prior notice and yet still engage with the Company related activities on behalf of her and other staff after the alleged date of termination from employment. The evidence clearly shows that the Claimant had been working for the Company even after the 05.04.2020.

[25] The Claimant had further in her pleaded case and by her own evidence in Court had also admitted that she continued to work for the Company even after the purported termination from employment on the 05.04.2020 and had further received subsidy for her wages from the government all on the basis that she was an employee of the Company.

[26] Based on all the evidence before this Court, it is the findings of this Court that the Claimant was not dismissed from her employment by the Company on the 05.04.2020 and certainly the Claimant was not dismissed from employment without prior notice as alleged by her.

[27] 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 Claimant had failed to prove on the balance of probabilities that the Claimant was dismissed from her employment as alleged by her . As the Claimant is unable to prove that she was dismissed by the Company from her employment with the Company, the issue of the dismissal of the Claimant without just cause or excuse is no longer an issue that this Court needs to consider and determine in the circumstances of this case.

[28] Accordingly, the Claimant's claims against the Company hereby dismissed.

HANDED DOWN AND DATED THIS 02ND DAY OF FEBRUARY 2023

-Signed-
(AUGUSTINE ANTHONY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR