ANIZA HUSSIN
v.
NETRISE NIAGA (M) SDN BHD

Industrial Court, Kuala Lumpur
Augustine Anthony
Award No: 1466 Of 2023 [Case No: 4/4-596/22]
3 July 2023

Case(s) referred to:

Bayer (M) Sdn Bhd v. Ng Hong Pau [1999] 1 MELR 7; *[1999] 1 MLRA 453; [1999] 4 MLJ 361; [1999] 4 CLJ 155; [1999] 4 AMR 3913 (refd)*
Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 1 MELR 17; *[2001] 1 MLRA 305; [2001] 3 MLJ 529; [2001] 3 CLJ 541 (refd)*
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 MLRA 415; [1981] 2 MLJ 129 (refd)
Ireka Construction Berhad v. Chantiravathan a/l Subramaniam James [1995] 1 MELR 373; [1995] 2 ILR 11 (refd)
K A Sanduran Nehru Ratnam v. I-Berhad [2006] 1 MELR 114; *[2006] 2 MLRA 467; [2007] 2 MLJ 430; [2007] 1 ILR 257; [2007] 1 CLJ 347; [2007] 1 AMR 468 (refd)*
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 2 MLRA 23; [1995] 3 MLJ 537; [1995] 4 CLJ 449; [1996] 1 AMR 049 (refd)
Mohd Nor Hassan & Ors v. Continental Sime Tyre PJ Sdn Bhd [2014] MELRU 258; [2014] 3 ILR 144 (refd)
Rasalechumi A/P Kanagaratnam v. Lourdes Medical Services Sdn Bhd and 3 others [2021] MELRU 1298; [2021] 4 ILR 176 (refd)
Stephen Bong v. FCB (M) Sdn Bhd & Anor [1999] 5 MLRH 107; [1999] 3 MLJ 411 (refd)
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 1 MELR 4; *[2002] 1 MLRA 188; [2002] 3 MLJ 129; [2002] 3 CLJ 314; [2002] 3 AMR 2898 (refd)*
Vithylingam Letchumanan v. Ice Room Food & Beverage Management Sdn Bhd [2015] MELRU 1269; [2015] 4 ILR 655 (refd)
William Jacks & Co (M) Sdn Bhd v. S Balasingam [1996] 1 MELR 312; *[1996] 2 MLRA 678; [2000] 7 MLJ 1; [1997] 3 CLJ 235; [1997] 3 AMR 2585 (refd)*

Legislation referred to:

Industrial Relations Act 1967, ss 20, 30(5), (6), (6A)

Counsel:

For the claimant: Sivaranjani Manickam; UNI Malaysia Labour Centre
For the company: Nanthini Nair (Hoe Mei Lei with her); M/s Idris & Partners

[Order accordingly.]

AWARD

Augustine Anthony:

[1] Pursuant to the directions of this Court, the parties in this matter filed their respective submissions accordingly. This Court received the following written submissions of the parties namely the Claimant's written submissions received on the 3 May 2023, the Company's written submissions dated 10 May 2023, the Claimant's written submissions in reply dated 31 May 2023 and the Company's written submissions in reply 31 May 2023.

[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 date 24 September 2022 with the Annexure therein;

(ii) The Company's Statement in Reply dated 25 October 2022 with the Annexure therein;

(iii) The Claimant's Rejoinder dated 9 December 2022;

(iv) The Claimant's Bundle of Documents - CLB;

(v) The Company's Bundles of Documents - COB1,COB 2 & COB 3;

(vi) The Claimant's Witness Statement - CLW - WS;

(vii) Company's Witness Statement - COW- WS (Puan Edayu Seliza Azyze Binti Ismett Azyze);

Introduction

[3] The dispute before this Court is the claim by the Claimant that she was dismissed from her employment by way of retrenchment by the Company without just cause or excuse on the 15 May 2021.

[4] The Company is involved in the food services business. The Claimant commenced employment with the Company on the 15 February 2012 as a Human Resources Executive. The Claimant was confirmed in her employment with the Company on the 14 August 2012 and the Claimant's last drawn salary was RM2,100.00 together with a special allowance of RM550.00. On the 11 March 2021, the Claimant was notified that due to the COVID-19 pandemic the Company's finances has suffered and the Claimant will be terminated from her employment. On the 16 March 2021, the Claimant received a letter of termination of the Claimant with the Claimant being given a two months' notice. There is no dispute that the Claimant was dismissed from her employment on the 15 May 2021. The Claimant states that the Company had in bad faith terminated her from her employment and has also

engaged in unfair labour practices. The Claimant now states that she was dismissed from her employment with the Company was without just cause or excuse and prays that she be reinstated to her former position without any loss of wages and other benefits.

[5] The Company however contends that as it is involved in the business of food services, the COVID 19 pandemic has caused significant negative impact on the Company's financial position and as such the Company had to reorganise its business in order to mitigate the financial loss and one of the decision taken by the Company was to retrench its employees and this decision of the Company was explained to the Claimant. The Company further states that the Claimant's dismissal from her employment was a *bona fide* exercise of the Company in its managerial powers to reorganise its business and that the Claimant was dismissed with just cause or excuse. The Company now prays that the Claimant's case be dismissed.

[6] The Claimant gave evidence under oath and remained the sole witness for her case. The Company's evidence was adduced through COW (Edayu Seliza Azyze Binti Ismett Azyze, the director of the Company who gave evidence on the circumstances leading the dismissal of the Claimant from her employment with the Company).

The Claimant's Case

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

(i) The Claimant commenced employment with the Company on the 15 February 2012 as a Human Resources Executive;

(ii) The Claimant was confirmed in her employment with the Company on the 14 August 2012;

(iii) The Claimant's last drawn salary was RM2,100.00 together with a special allowance of RM550.00;

(iv) On the 11 March 2021, the Claimant was notified that due to the COVID-19 pandemic the Company's finances has suffered and as a consequence the Claimant will be terminated from her employment;

(v) On the 16 March 2021, the Claimant received a letter of termination of the Claimant with the Claimant being given a two months' notice of the termination from employment;

(vi) At the time the Claimant was given the notice of termination on the 16 March 2021, the Claimant was an expectant mother and the Company has misused the maternity leave period as notice period for her termination from employment;

(viii) The Claimant was terminated from her employment on the 15 May 2021;

(ix) The Claimant states that the Company had in bad faith terminated her from her employment and has also engaged in unfair labour practices;

(x) The Claimant now states that her dismissal from employment with the Company was 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's Case

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

(i) The Company does not dispute the Claimant employment history, her last drawn salary and that the Claimant was a confirmed employee of the Company;

(ii) The Company states that it is involved in the business of food services and the COVID 19 pandemic has caused significant negative impact on the Company's financial position;

(iii) The Company had to reorganise its business in order to mitigate the financial loss and one of the decision taken by the Company was to retrench its employees. The decision of the Company was explained to the Claimant;

(iv) The Company's decision to terminate its employees not only involved the Claimant but other employees of the Company were also affected;

(v) The Claimant was given notice of termination consistent with the Claimant's contract of employment with the Company;

(vi) The Claimant's dismissal from her employment was a *bona fide* exercise of the Company in its managerial powers to reorganise its business;

(vii) The Claimant was dismissed with just cause or excuse;

(viii) The Company now prays that the Claimant's case be dismissed.

The Law

Role And Function Of The Industrial Court

[9] The role of the Industrial Court under s 20 of the Industrial Relations Act 1967 is succinctly explained in the case *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 2 MLRA 23; [1995] 3 MLJ 537; [1995] 4 CLJ 449; [1996] 1 AMR 049. 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] 1 MLRA 412; [1995] 2 MLJ 753; [1995] 3 CLJ 344; [1995] 2 AMR 2145, 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..."

[10] The above principle was further reiterated by the Court of Appeal in the case of *K A Sanduran Nehru Ratnam v. I-Berhad* [2006] 1 MELR 114; [2006] 2 MLRA 467; [2007] 2 MLJ 430; [2007] 1 ILR 257; [2007] 1 CLJ 347; [2007] 1 AMR 468 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 Bhdand Another Appeal* [1995] 1 MLRA 412; [1995] 2 MLJ 753; [1995] 3 CLJ 344; [1995] 2 AMR 2145 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"

[11] 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 MLRA 415; [1981] 2 MLJ 129 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

[12] Whenever a Company has 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] 1 MELR 373; [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

[13] In the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 1 MELR 4; [2002] 1 MLRA 188; [2002] 3 MLJ 129; [2002] 3 CLJ 314; [2002] 3 AMR 2898 the Court of Appeal has 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 HWR Wade & CF 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."

The Law On Redundancy And Retrenchment

[14] In the case of *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1996] 1 MELR 312; [1996] 2 MLRA 678; [2000] 7 MLJ 1; [1997] 3 CLJ 235; [1997] 3

AMR 2585 his lordship Justice Gopal Sri Ram JCA delivering the judgment of the Court of Appeal had the occasion to define the term "retrenchment" as an exercise by the Company when dealing with excess labour supply that does not include dismissal by way of punishment for misconduct. His lordship had this to state:

> "The issue before that Court was whether there was a genuine retrenchment exercise *vis-a-vis* the respondent. Retrenchment means: "the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action" (per SK Das J in *Hariprasad v. Divelkar* AIR [1957] SC 121 at p 132).
>
> Whether the retrenchment exercise in a particular case is *bona fide* or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organise his business in the manner he considers best. So long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact *bona fide*".

[15] The process of retrenchment can arise in a Company due to redundancy where there exists a surplus of labour or where a business requires fewer employees of whatever kind as explained in the following cases below.

[16] In the case of *Vithylingam Letchumanan v. Ice Room Food & Beverage Management Sdn Bhd* [2015] MELRU 1269; [2015] 4 ILR 655, the learned chairman Eddie Yeo Soon Chye (as he then was) had opined that:

> "The term "redundancy" has been defined by Dunston Ayudurai in " *Industrial Relations in Malaysia*, Law & Practice", 3rd edn at pp 255 and 256 as follows:
>
> > Redundancy refers to a surplus of labour and is normally the result of a reorganisation of the business of an employer, and its usual consequence is retrenchment, ie, the termination by the employer of those employees found to be surplus to his requirements after the reorganisation. Thus, there must first be redundancy or surplus of labour before there can be retrenchment or termination of the surplus."

[17] In the case of *Stephen Bong v. FCB (M) Sdn Bhd & Anor* [1999] 5 MLRH 107; [1999] 3 MLJ 411 his lordship Nik Hashim J had this to say:

> "With respect, I agree with Mr N Sivabalah's submission that it is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where the business requires fewer

> employees of whatever kind '(*Harvey on Industrial Disputes*)'. In the case before me, it is the Company's case that there was reduced work and reduced business, which made the applicant's position as an executive director in charge of one group redundant. The Industrial Court is right when it held that the applicant was redundant."

[18] In determining whether the Claimant was dismissed with just cause or excuse by the retrenchment exercise undertaken by the Company this Court will ask these pertinent questions:

> (i) Whether there was a genuine need for the reorganization exercise by the Company;
>
> (ii) Whether a genuine redundancy situation had arisen which led to the retrenchment of the Claimant; and
>
> (iii) Whether the Company had complied with the accepted standards and procedure when selecting and retrenching the Claimant.

[19] To this effect this Court is guided by the reasoning contained in the case of *Mohd Nor Hassan & Ors v. Continental Sime Tyre PJ Sdn Bhd* [2014] MELRU 258; [2014] 3 ILR 144. If the Company is able to answer all the above three questions in the affirmative, then this Court must come to a conclusion that the retrenchment exercise undertaken by the Company against the Claimant is a *bona fide* exercise of the managerial powers of the Company.

[20] Further in the case of *Bayer (M) Sdn Bhd v. Ng Hong Pau* [1999] 1 MELR 7; [1999] 1 MLRA 453; [1999] 4 MLJ 361; [1999] 4 CLJ 155; [1999] 4 AMR 3913 the his lordship Justice Shaik Daud Ismail JCA, delivering the judgment of the Court of Appeal had the occasion to opine as follows:

> "The burden is on the appellant to prove actual redundancy on which the dismissal was grounded. (See *Chapman & Others v. Goonvean & Rostawvack China Clay Co Ltd* [1983] 2 All ER). It is our view that merely to show evidence of a re-organisation in the appellant is certainly not sufficient. There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. After his dismissal his workload was taken over by two of his former colleagues. Faced with these evidence, is it any wonder that the court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's functions were reduced to such an extent that he was considered redundant."

Evaluation Of Evidence And The Finding Of This Court

[21] The Claimant was offered employment as a Human Resources Executive on the 15 February 2012 and the Claimant was subsequently confirmed in her employment (this is an undisputed facts contained in the pleadings).

[22] The Claimant was retrenched by the Company which took effect on the 15 May 2021, which the Company claims was due to redundancy of the Claimant in the Company. The Company states that the Claimant's retrenchment was due to the Company restructuring its business organisation as a consequence of the Company's dire financial situation arising from the effect of the COVID 19 pandemic.

[23] COW gave evidence that due to the COVID 19 pandemic and the movement control order imposed by the government, the Company has suffered huge financial losses and the Company was forced to pay the salary of not only the Company's staff but the staff of other group of companies who had stopped their operations. This witness further testified that in view of the financial impact on the Company and its group of companies, the management of the Company has decided to retrench its employees. COW further testified that the selection process used by the Company to retrench its employees took into account the type of work carried out by the employees, the quality of the performance and the abilities/inabilities of the employees selected to execute their responsibilities effectively wherein a total of 6 employees were retrenched. During cross examination this witness also admitted that the Claimant was not only made to do the job in the Company but also for the group of companies which involves in the business of cleaning works which was not affected at all. The witness also admitted in cross examination that there are no documents to show the selection criteria that were undertaken by the Company before retrenching the Claimant. This witness further admitted that the Company's revenue was used to pay the salaries of employees of other companies within the group and this has resulted in the shortage of the Company's funds to manage its finances.

[24] The Claimant gave evidence that she has discharged her duties for the Company diligently and that the Claimant's work in the Company exists despite the Company's insistence that she was made redundant. The Claimant evidence also shows that she was made to carry out duties for the work related to the group of companies' cleaning business and her job scope continued to exist at all times. The Claimant further gave evidence that despite the Company stating that it was in financial difficulties, the Company continued to hire new employees to work for the Company.

[25] Previously this Court had to deal with retrenchment of employees during this COVID-19 period and in the case of *Rasalechumi A/P Kanagaratnam v. Lourdes Medical Services Sdn Bhd and 3 others* [2021] MELRU 1298; [2021] 4 ILR 176, this Court had this to say:

> "[22] Around the period of late 2019 and early 2020, the world had to confront (still continue to confront) an unprecedented health emergency never seen in the living memory of this generation and will continue to be etched in the memories of many generations to come. This health emergency is now known as the COVID19 pandemic. Movement control orders were imposed across the world. Malaysia was not spared by this pandemic. To contain the pandemic and protect lives, the Malaysian government had to impose a movement

> control order (MCO) and the first phase of the MCO was ordered and imposed effective 18 March 2020, for a 14 days period ending 31 March 2020.
>
> [27] ..... The MCO may have been a very difficult period for the company and this court is mindful not to be indifferent to the plight of companies especially the company here but the same MCO is certainly a period of great anguish and pain for ordinary wage earners fearful of losing their jobs and livelihood. Great care must and ought to have been taken by the company in that the retrenchment exercise would only be resorted to in the most genuine circumstances and it must be a *bona fide* exercise of the company's managerial powers to organise its business."

[26] The important factor to be considered whenever a retrenchment exercise is undertaken by the Company will be the Company's conduct that reflects an utmost good faith that always have the interest of the employees and their right to livelihood. Such *bona fide* exercise of the Company when retrenching its employees can be seen from the action taken by the Company before the retrenchment exercise including the Company's level of reluctance and restraint in resorting to the retrenchment exercise. Matters relating to a genuine need for the reorganization exercise of its business by the Company which leads to an inevitable redundancy situation leading to retrenchment and whether the Company had complied with acceptable standards and procedure before selecting the employee for retrenchment are all factors that will be looked at by this Court in concluding whether the action of the Company is or is not tainted with bad faith.

[27] This Court has considered the evidence of the Claimant and the Company's witness and must firstly come to the conclusion that despite the Company facing some financial hardship, the manner in which the Company has dealt with its finances to cover the cost of operation of the other group of companies is something that was done knowing that it will lead to hardship to its own employees.

[28] The evidence before this Court is overwhelming in that the Claimant was not redundant at all and the Claimant was doing her work in the normal way including for the cleaning business which required her substantial input. For the Company to suggest that the Claimant was retrenched because she was redundant in the Company is wholly inaccurate. It is for this reason the Company was not able to convincingly prove in this Court the selection criteria that was undertaken before the Claimant was retrenched. The manner in which the Company has proceeded to retrench the Claimant raises questions on the Company's *bona fide* exercise of its managerial powers to reorganise its business in the best way possible.

[29] The evidence of the Claimant was convincing that she was not redundant and that she was a long serving and capable employee who had discharged her duties in the Company faithfully. It was unfortunate that the Claimant was an expectant mother and that she was selected for the retrenchment exercise even

though there was no convincing proof before this Court that the Claimant's workload has reduced to such an extent that she could be considered redundant. This Court has reiterated before that COVID 19 pandemic may cause hardship to many businesses but the pandemic should not always be used as an excuse to retrench the employees whose job in the company continue to exist just because the company experiences some business downtrend.

[30] Whether the retrenchment of the Claimant by the Company was a *bona fide* exercise on part of the Company in its managerial powers and prerogative to organise its business in the manner it considers best must be supported by convincing evidence before this Court. Having considered all the evidence adduced before this Court, this Court is of the view that the alleged *bona fide* restructuring and reorganisation of the Company's business that led to the retrenchment of the Claimant is not convincing at all considering the fact that the Claimant's job still exist in the Company. This Court is also not convinced having considered the evidence of COW that the selection of the Claimant for retrenchment due to redundancy and the selection process was *bona fide*. This Court is further convinced that there exist elements of bad faith and unfair labour practices in the retrenchment of the Claimant from her employment with the Company.

[31] Pursuant to s 30(5) of "The Act" 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 has failed to prove on the balance of probabilities that the dismissal of the Claimant from her employment with the Company was with just cause or excuse. Accordingly this Court holds that the Claimant was dismissed without just cause or excuse.

Remedy

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

[33] The Claimant was a confirmed and permanent employee of the Company. The Claimant commenced employment with the Company on the 15 February 2012. The Claimant was dismissed from her employment with the Company effective 15 May 2021. The Claimant has thus served the Company for a period of 9 full years.

[34] 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 or other benefits. Considering the factual matrix of this case and that the Claimant had since found a new employment with another company, it is this Court's view that reinstatement of the Claimant to her former position in the Company not

a suitable remedy in the circumstances of this case.

[35] As such the appropriate remedy in the circumstances of this case must be compensation *in lieu* of reinstatement. The Claimant is also entitled for backwages in line with s 30(6A) of "The Act" 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;

[36] The Claimant's last drawn salary per month was RM2,100 with a monthly special allowance of RM550.00 which makes the Claimant's total wages RM2,650.00 per month.

[37] 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 to by this Court at all times leading to the final order of this Court.

[38] 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] 1 MELR 17; [2001] 1 MLRA 305; [2001] 3 MLJ 529; [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]

[39] This Court must take into account the post dismissal earnings of the Claimant in order to make an appropriate deduction from the backwages to be awarded. The Claimant has given evidence that after her dismissal from employment with the Company, she managed to find a job in another company with a monthly salary of RM2,500.00 per month in September 2022. This post dismissal income of the Claimant will be taken into account in considering the amount to be ordered by scaling down on the number of

months of backwages from the maximum of 24 months that can be ordered. No exercise with mathematical precision will be undertaken by this Court in scaling down and making the necessary deduction for the backwages to be ordered.

[40] In line with s 30(6) and 30(6A) of "The Act" and after having considered all the facts of case on the appropriate sum to be awarded and after taking into account the Claimant's post dismissal earnings, this Court hereby orders that the Claimant be paid 1 month of the total wages of the last drawn wages of RM2,650.00 for every year of service completed totalling 9 years as compensation *in lieu* of reinstatement and backwages of the last drawn wages of RM2,650.00 for 15 months. This will amount to:

(i) Backwages ordered:

RM2,650.00 x 15 months = RM 39,750.00

(ii) Compensation *in lieu* of Reinstatement:

RM2,650.00 x 9 months = RM23,850.00

Total amount ordered by this Court: RM 63.600.00

Final Order Of This Court

[41] It is this Court's order that the Company pays the Claimant a sum of Ringgit Malaysia Sixty Three Thousand Six Hundred (RM63,600.00) only less statutory deduction (if any) within 30 days from the date of this Award.