

IN THE INDUSTRIAL COURT MALAYSIA

AT KUALA LUMPUR

CASE NO: 15/4-551/19

BETWEEN

NG SAI LEE

AND

GUOCERA SDN. BHD.

AWARD NO : 1676 OF 2020

Before : **Y.A. PUAN REIHANA BTE ABD. RAZAK**
Chairman

Venue : Industrial Court, Kuala Lumpur

Date of reference : 12.04.2019

Dates of mention : 09.05.2019, 20.06.2019, 03.07.2019,
23.07.2019, 15.08.2019, 23.08.2019,
13.01.2020, 02.03.2020, 16.03.2020.

Dates of hearing : 25.09.2019, 27.09.2019, 24.10.2019,
05.12.2019, 11.12.2019, 30.01.2020,
10.02.2020.

Representation : Mr. Suria Kumar D.J. Paul
Messrs. Suria Kumar & Co.
Counsel for the Claimant

Mrs. Mehala Marimuthoo together with
Ms. Nurhamizah Bustami
Messrs. Shook Lin & Bok
Counsel for the Company

REFERENCE

This is a reference by the Minister of Human Resources pursuant to Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **NG SAI LEE** (The Claimant) by **GUOCERA SDN. BHD.** (The Company) on **16.10.2018**.

AWARD

BACKGROUND

[1] This case **15/4-551/19 NG SAI LEE** was jointly heard with case no **15/4-552/19 KAN FUI CHENG**, **15/4-553/19 YOGASWARAN AIL NADRAJA**, **15/4-554/19 ONG CHENG HOON**, **15/4-555/19 NALANI A/P RAMASAMY @ THUVKANU** and the Company **GUOCERA SDN. BHD.**

BRIEF FACTS

[2] The Company is with the Guocera Group of companies primarily engaged in the manufacturing and distribution of a full range of ceramic and porcelain wall and floor tiles.

[3] The Claimant commenced employment with the Company on 16.09.1995 as a Sales Administration Clerk. At the time of her dismissal, she held the position of Manager for Marketing Services with a salary of RM8, 260.00.

[4] The Claimant asserts that on 16.10.2018, the Company called the Claimant together with all other employees to attend a brief meeting at the Company's town hall where after the meeting, her Head of Department in the present of the Company's Financial Controller handed her with a Notice of Retrenchment.

[5] The Claimant claimed she was then asked to sign Notice of Retrenchment immediately without been given any opportunity to consider the said notice or seek advice and thereafter she was told to go to the Company's Human Resources Department to collect her income tax documentations before leaving the Company's premise.

[6] The Claimant contends that her termination by the Company amounts to dismissal without just cause or excuse and unfair labour practice.

[7] The Company avers that due to the significant impact on the profitability of the business and reduction in the production, marketing, sales, and other functions, the Company's business was affected.

[8] The Company averred that after a thorough assessment of its business, the Guocera Group of companies including the Company embarked on a nationwide restructuring and retrenchment exercise across its entities to enable it to continue as a going concern, sustain its operations, improve its profit, reinvent its business strategies, and achieve operational effectiveness to capture the market.

[9] The Company contend that various functions within the Guocera group of companies, including the Claimant were identified as redundant, resulting in approximately 248 employees being retrenched as their positions were abolished and their functions ceases to exist in the organization.

[10] The Company further averred that the Company introduced a new system in 2017 where the business software in the system integrated all areas of business and provides end-to-end solutions for all the processes in the business with very less human intervention and managerial supervision.

[11] The Company avers that the Claimant's position as the Manager, Marketing Services in the Marketing Sales Domestic Department was identified as a surplus to the Company's work force requirement. .

[12] As a measure of goodwill in line with the package offered to employees affected by the retrenchment exercise, the Company offered the Claimant a severance package in the sum of RM71,672.42 which she accepted without any protest or complaint over the sum she received from the Company.

[13] The Company contended that there was a genuine need to reorganize its business in the manner it deems fit and that the Claimant's position was redundant and her function ceases to exist.

[14] The Claimant's dismissal was because of the retrenchment exercise carried out by the Company.

THE LAW

[15] As there is no dispute on the issue of dismissal in this case, the sole issue that arose for the determination of the Court is whether the Claimant's dismissal was with just cause or excuse.

[16] In **COLGATE PALMOLIVE SCLN. BHD. V. YAP KOK FOONG (AWARD 368 OF 1998)**, it was held as follows:

"In a section 20 reference, a workman's complaint consists of two elements: firstly, that he has been dismissed, and secondly that such dismissal was without just cause or excuse. It is upon these two elements being established that the workman can claim his relief, to wit, an order for reinstatement, which may be granted or not at the discretion of the Industrial Court. As to the first element, industrial jurisprudence as developed in the course of industrial adjudication readily recognizes that any act which has the effect of bringing the employment contract to an end is a 'dismissal' within the meaning of section 20. The terminology used and the means resorted to by an employer are of little significance; thus, contractual terminations, constructive dismissals, non-renewals of contract, forced resignations, retrenchments and retirements are all species of the same genus, which is 'dismissal'."

[17] The dismissal in the present case is about retrenchment arising out of a reorganization exercise by the Company. It is trite law that the

right to reorganize is a managerial prerogative as was firmly in the case of **WILLIAM JACKS & CO. (M) SDN. BHD. V S. BALASINGAM [1997] 3 CLJ 235** where the Court of Appeal define the term “retrenchment” as follows:-

“Retrenchment’ has been defined as the discharge of surplus labour or staff by an employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action. Whether the retrenchment exercise in a particular case is bona fide or otherwise is a question of fact and of degree depending on the peculiar circumstances of the case.

It is well settled that the employer is entitled to organize his business in the manner he considers best. So long as the 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 the case to determine whether the exercise of power is in fact bona fide”.

[18] In the case of **HARRIS SOLID STATE (M) SDN. BHD & ORS V. BRUNO GENTLL PEREIRA & ORS [1996] 4 CLJ 747**, Gopal Sri Ram JCA at p. 767 held as follows:

An employer may organise his commercial undertaking for any legitimate reason, such as promoting better economic viability. But he must not do so for a collateral purpose, for example, to victimize his workmen for their legitimate participation in union activities. Whether the particular exercise of managerial power was exercised bona fide or for collateral reasons is a question of fact that necessarily falls to be decided upon the peculiar circumstances of each case."

[19] In **PENKALEN HOLDINGS BHD. V. JAMES LIM HEE MENG [2000] 2 ILR 252** the Court summarizes the proposition on redundancy as follows:

“The existence of surplus or supernumerary staff or a redundancy situation can arise due to a number of situations. A business entity facing a severe cutback in business volume or which is attempting to rationalise its business may have to reorganise and/or downsize. Where a whole production line or business unit is discontinued, the need for employees to work on that line or unit no longer exists. Both the job functions and the jobs of the employee in the said line or unit have ceased to exist. The business entity with such a problem of surplus workers would have to consider the painful option of retrenchment of its surplus staff who were previously holding posts which have since become redundant and are abolished accordingly.”

[20] A genuine redundancy may also arise when the business requires fewer employees. In the case of **STEPHEN BONG V. FCB (M) SDN. BHD. & ANOR [1999] 1 LNS 131** the High Court Judge stated as follows:-

“...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.”

[21] The burden of proof of is on the employer to prove actual redundancy with concrete proof which eventually leads to the retrenchment of the employee. Merely to show evidence of re-organization by the Company is not sufficient. The Court of Appeal in **BAYER (M) SDN. BHD. V. NG HONG PAU [1999] 1 MELR** stated as follows: -

On redundancy it cannot be gainsaid that the appellant must come to the Court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded.

[22] In the case of **SISTEM TELEVISYEN MALAYSIA BHD. & ANOR V. SUZANA ZAKARIA [2005] 1 ILR 853 AT P.856**, held as follows:

“..... Hence to justify the retrenchment, there must first be redundancy. To prove redundancy, the company must prove that there is surplus of labour or that the requirement of the job functions of the employee has ceased or has greatly diminished to the extent that the job no longer exists or that the business requires fewer employees of whatever kind resulting from a reorganization exercise or due to whatever other legitimate reasons”.

[23] In determining whether the Claimant was dismissed with just cause or excuse by the retrenchment exercise undertaken by the Company, this Court will have to determine whether there was genuine redundancy situation had arisen which requires a need for the reorganization exercise by the Company.

EVALUATION AND FINDINGS

[24] At the commencement of the trial, the Company's Counsel raised an objections under Section 54 Industrial Relations Act. 1967 as to the admissibility as evidence the Claimant's Letter of Complaint to the Industrial Relations Department dated 22.11.2018 in page 37-39; CLB 1.

[25] Section 54 of The Industrial Relations Act, 1967 provides as follows: -

"Exclusion of evidence as to certain matters54. (1) where a trade dispute relates to matters as to which negotiation or conciliation proceedings have taken place under this Act, no evidence shall be given in the proceedings before the Court as to such negotiation or conciliation proceedings other than a written statement in relation thereto agreed to and signed by the parties to the dispute.

(2) In a proceeding before the Court on a reference to the Court under subsection 20(3), no evidence shall be given of any proceeding before the Director General under subsection 20(2) other than a written statement in relation thereto agreed to and signed by the parties to the reference.

(3) No evidence shall be given in proceedings before the Court with regard to any offer relating to any matter connected with the trade dispute made without prejudice by any person or trade union except with the consent of that person or trade union.

(4) The exclusion specified in subsections (1), (2) and (3) shall also be applicable in any proceedings before any other Court."

[26] The Company submit that the letters dated 22.11.2018 was addressed to the Industrial Relation Department containing the Claimant's grievances against the Company forwarding various allegations over the retrenchment exercise carried by the Company on 16.10.2018.

[27] The Company submits that the said letters clearly caught by the limitation of s. 54 of the Act because it was prepared and submitted at the material time the representations were filed and during the conciliation stage proceeding before the officers at the Industrial Relations Department.

[28] The Company state that s. 54(2) of the Act clearly states that *"no evidence shall be given of any proceeding before the Director General under subsection 20(2) **other than a written statement in relation thereto agreed to and signed by the parties to the reference**".*

[29] The Company submits that the Claimant's letters dated 22.11.2018 is inadmissible pursuant to Sec 54(2) of the Act on the basis the letter is not **"a written statement ...agreed to and, signed by the parties to the reference"**.

[30] The Company submits that nothing in the said letter refers to any statement agreed to and signed by the Company. The said letter is neither is a written statement agreed to and signed by the Claimant and the Company who are parties to the reference.

[31] The Company submits that in a proceeding before the Court on a reference under section 20(3), no evidence given in the proceeding before the Director-General of the Industrial Relations under section 20(2) which is the conciliation proceeding, unless a written statement agreed to and signed by the Claimant and Company who are parties to the reference is produce before the Court.

[32] The Company further submits that the Claimant's letters dated 22.11.2018 is inadmissible pursuant to Sec 54(3) of the Act because there is no consent given either by the Company or by the Claimant to be produce before the proceeding in this Court.

[33] The Company submits that the said letters clearly caught by the limitation of s. 54 of the Act because it was prepared and submitted at the material time the representations were filed and was before the Director General of the Industrial Relations during the conciliation proceeding at the Industrial Relations Department.

[34] The Company submits that letter is a document that formed part of the conciliation proceedings, therefore it ought to be excluded.

[35] The Company submits that the Federal Court in ***Minister of Labour & Manpower & Anor v. Wix Corporation South East Asia Sdn Bhd [1980] 2 MLJ 248 (FC)*** should be followed to exclude all evidence “*before the Director General under subsection 20(2) other than a written statement in relation thereto agreed to and signed by the parties to the reference*”.

[36] The Claimant contended that the letter dated 22.11.2018 is only a written complaint made to the Industrial Relations Office pursuant to Section 20(3) Industrial Relations Act 1967.

[37] The Claimant argued that the letter is not caught by the ambit of s. 54 of the Industrial Relations Act 1967 because it is merely a written complaint to the Industrial Relations Office pursuant to Section 20(3) Industrial Relations Act 1967 made prior to the conciliation proceeding in the Industrial Relation Department and not during the conciliation proceeding.

[38] The Claimant contended that the letter dated 22.11.2018 only contains the version of the Claimant in respect of events that led to the dismissal and has nothing to do with the events that transpired in the conciliation proceedings. Therefore, the Claimant submit that the letter dated 22.11.2018 are admissible as evidence.

[39] The Claimant contended that the letter does not contain evidence neither is evidence of the conciliation proceeding before the Director-General of the Industrial Relations at the Industrial Relations Department. As such, the letter should be admissible as evidence supporting the Claimant's case in the hearing before this Court.

[40] The Claimant submits that the Company failed to show that the said the letter are documentary evidence relied upon by the Claimant in the conciliation proceeding before the Director-General of the Industrial Relations at the Industrial Relations Department.

[41] A proceeding before the Industrial Court on a reference under section 20(3) IRA comes about when there is no settlement in the conciliation proceedings before the Director-General of Industrial Relations at the Industrial Relations Department. The Industrial Court is then to determine the dismissal based on the pleadings and justifications, which both parties shall make and advance at the hearing.

[42] A plain reading of the provision of Sec 54 of the Act, it is a clear provision is that the legislature intended to exclude as evidence proceedings before the Director-General of Industrial Relations not only from the Industrial Courts but also from other Courts too.

[43] The Federal Court in ***MINISTER OF LABOUR AND MANPOWER & ANOR. v. WIX CORPORATION SOUTH EAST ASIA SON. BHD. [1980] 2 MI-J 248***, was concerned with keeping out evidence that transpired in the conciliation proceedings.

[44] The Court is of the view that in conciliation proceedings parties are free to make confessions admissions and offers to each other with a view to settle the case.

[45] Having perused the pleadings and the counsels' submissions on the objection raised, the Court opined that the said letter dated 22.11.2018 was prepared and submitted at the material time the representations was filed and obviously should have been before the Director-General of Industrial Relations to be referred to and will form part of the evidence of the Claimant during the conciliation proceeding at the Industrial Relations Department.

[46] This Court is of the view that it should not be concerned with what tendered or transpired at the conciliation proceeding e before the Director-General of Industrial Relations at the Industrial Relations Department. The said letter no matter what is the content of it is a document that formed part of the Claimant's evidence at the conciliation proceedings.

[47] The letter too is not a written statement agreed to and signed by the parties to the reference. As such, the said letter was caught within the ambit of section 54.

[48] This Court therefore finds that whatever adduced and transpired between the parties at the conciliation stage in the Industrial Relation Department ought not to be taken into account in considering the Claimant's claim for reinstatement. The production and the disclosures of the letter dated 22.11.2018 before this Court is not admissible

[49] The final award by the Court shall be made on the pleadings and justifications which both parties advance at the hearing excluding all the references made to the Claimant's letter dated letter dated 22.11.2018 before this Court.

[50] The Company called the Head of Supply Chain, Mr. Peter James Williams(COW-1), the Guocera Group of companies and the Company's Financial Controller Mr. Lam Kong Chark (COW-2), the Company's Head of Retail Sales, Mr. Tan Kok Sang, (COW-3) and the Company's Human Resources Manager, Mr. Bhupinder Singh (COW-4) while the Claimant was the sole witness for her case.

[51] In the Notice of Retrenchment dated 15.10.2018, the Company informed the Claimant that the Company's sales and profit had reduced significantly in the past years and that the Company need to take steps across the organization to lower costs and operate more efficiently.

[52] The Company also stated in the Notice of Retrenchment that following the assessment of the Company's business structure, the

Claimant's position was abolished and her role has become redundant.

[53] The Claimant asserts that it is not true and merely an afterthought of the Company that it suffered loss of profits due to lack of demand in its [product and that the sales volume was down. The Claimant submit that the Company was not facing any financial difficulties because the Company paid bonuses to employees in January 2019 which was not long after the retrenchment exercise on 16.10.2018 and also upgraded employees which also would had entail an increase in salaries.

[54] The Claimant contended there was no reason for the Company to embark in restructuring exercise because they had not taken the necessary steps of cost cutting measures before the retrenchment.

[55] The Claimant contended that the Company's reliance on the headcount reduction as reflected in COB-9 is missed conceived because it is only an estimation for the companies under Guocera Holdings and does not reflect the actual savings of the Company.

[56] The Claimant also avers that there was also no evidence to show that the Company was suffering with financial losses as there was no attempts made by the Company to cut costs, reduce employee's salaries or overtime or the Company tried to transfer her to another department or another company within the Group.

[57] The Claimant further contends that there was no evidence adduced by the Company that the SAP system had successfully reduced the need for human resource or reduction in the number of employees.

[58] It is the Claimant's contention that there is no redundancy of her job because from the Organization Chart post retrenchment at page 233 COB-8, it shows that Marketing Services for Domestic Department still exists with the four junior employees retained to carry out her job functions

[59] The Claimant asserts that the deletion of her positions does not tantamount to her being redundant.

[60] It was the Claimant's contention that she served the Company for twenty-three years and was the most senior in terms of years of service in the department, but the Company retrenched her and retained the junior employees in terms of years of service to her.

[61] The Claimant contended that Chan Kar Yee who was in the service for 12 years, Aileen Chua 4 years, Tuen Yee Fan 6 years and Hor Sook Lee 4 years who are still in the department are all in the same category of employment with her in the Marketing Services for Domestic Department.

[62] The Claimant contended that the Company instead of retrenching her should have placed her at the Demand Planning

Department to replace one Anne Tan for the position of Demand Manager.

[62] The Claimant states that the Company transferred one Lee Wai Ling from the Sales Support Department who was junior to her in terms of years of service to take over the position of Demand Manager in the Demand Planning Department.

[63] The Claimant also averred that the Company did not retrenched one Cathy Teoh, the Manager in the Marketing Services Department for International who was much junior to her in terms of service.

[64] The Claimant contended that she was the next most senior in terms of years of service compared to all the remaining employees in the entire Supply Chain Department consisting of the Demand Planning, Marketing Services Department (MSD) for International, Marketing Services Department (MSD) for Domestic and Shipping as shown in the Organization Chart in page 212 COB-8.

[65] The Claimant contended that the Company failed to follow the LIFO principle not only with regards to the employees in the Marketing Services Department for Domestic where she was, but also in the entire Supply Chain Department of which the Marketing Services Department (MSD) for Domestic was a part of it when carrying out the retrenchment exercise.

[66] The Claimant contended that as a senior employee of the Company, she was victimized when the Company departed from the LIFO principle and did not provide any cogent reason as to why they had departed from the LIFO principle.

[67] The Claimant avers that the Company breaches their obligations under the relevant provision of the Code for Industrial Harmony as the Company failed to give her advance warning about the impending retrenchment.

[68] The Claimant asserts that the Company failed to give the Claimant any warning pertaining to the intended retrenchment exercise prior to the town hall meeting held on 16.10.2018.

[69] It was the Claimant's contention that the Company only made one announcement about the retrenchment exercise on 16.10.2018 within less than 24 hours as in their email dated 15.10.2018 sent at 12.38 pm.

[70] The Claimant further avers that the Company failed to provide any consultation with her prior to the retrenchment exercise.

[71] The Claimant states that prior to the retrenchment exercise, neither her Head of Department, Peter James Williams (COW-1) or anyone from the Company called or consulted her to explain why she was selected to be retrenched and her four junior executives to be retained.

[72] The Claimant avers that the reason put forward by the Company that her position is abolish and that her functions ceased to exist due to the introduction of the SAP system in 2017, is not true because there was no reduction in her job functions.

[73] The Claimant avers that the SAP system in 2017 did not minimize her functions or minimize the need of human intervention on her function as the Manager for Marketing Services in the Company.

[74] The Claimant contended that she is not redundant because the Company failed to show how the SAP system abolished her function as Manager for Marketing Services and that there was no comment put in under the Human Resource's column in the SAP presentation documents.

[75] The Claimant further contended that her functions and her position still exist because the Company placed advertisements for various vacancies after retrenching her as shown pages 40-41 CLB-1.

[76] The Claimant claimed that the advertisements show that the job functions were not abolished but the Company was just looking to engage employees at a lower salary to carry out her functions.

[77] It is the Company's case that the reasons leading to the need for the Company to carry out retrenchment exercise was due to the profits and sales for the Guocera Group of companies have reduced

tremendously as show in page 90-91 COB-7 while its operational costs had increased over 5 years as tabulated in page 188-189 COB-8.

[78] COW-2 the Guocera Group of companies and also the Company's Financial Controller in his evidence explained in detail about the inter-relation of the all the companies within the Guocera Group of companies. COW-2 states all the group of companies operate as a single entity but are inter-dependent in the business of manufacturing and distribution of tiles.

[79] COW-2 explained that Guocera Sdn. Bhd. (the Company) is an entity by itself operating from 2 locations where the manufacturing of porcelain product and ceramic products are done in Kluang while the functions of domestic sales and marketing and international sales and marketing is in Petaling Jaya.

[80] COW-2 also states that the manufacturing cost including the cost of production, Selling, General and Administration Expenses, unsold Finished Goods Stock and the Net Working Capital have been increasing for the Company's ceramic and porcelain factory in Kluang and Meru from years 2014 to 2018.

[81] COW-2 states that as the stock started to build up and with the softening of the demand of the orders, the Company then reduces production and subsequently closed its Kluang as well Meru kilns.

[82] COW-2 states that apart from the production and manufacturing

costs, the Company too bore the selling, general and administration expenses which was going up all the way in financial year 17/18.

[83] The Company's Head of Retail Sales, Mr. Tan Kok Sang, elaborated on the financial condition of the Company giving detail explanation about the difficulties and sales losses faced by the Company due to the challenges in the tiles industry.

[84] COW-3 compared all the revenues from sales for central, northern, and southern regions as well as the gallery sales performance as shown in page 190 COB-8 showing the decrease in the volumes of tiles sold and amount of sales from years 2016 to September 2018. COW-3 states that the Company also faces tremendous pressure coming from retail side because the price competitions.

[85] COW-3 also states that the Company closed up its old showroom and shifted to new showroom and before the retrenchment, the Company closed down the 1st floor showroom and operate only a smaller size showroom.

[86] COWS-4 the Company's Head of Human Resources Department, Mr. Bhupindar Singh explained in detail about the excess work force and cost savings exercise that led to the retrenchment.

[87] COW-4 states with the financial condition and after assessing on the number of employees in the Company, there were excess work

force in the Company, which require the Company to reduce the headcounts in the Company.

[88] COW-4 states that it did not make any business sense for the Company to keep the same number of workforce when the kilns have been closed, production and sales slowed down significantly.

[89] COW-4 states that the effect of the slowdown in manufacturing, sales and distribution rendered some functions and positions in the manufacturing, distribution, finance, marketing and sales departments was identified as redundant. COW-4 states that retrenchment is therefore inevitable if the Company intends to safeguard the business.

[90] COW-4 also explained that the SAP System introduced in year 2017 was another reason for the Company having to embark on the restructuring exercise where various functions in several departments within the Company were rendered redundant.

[91] COW-4 explained the SAP system implementation had completely minimized the need for human intervention on most of the business processes especially related to the entering of the data, stocks, orders, processing of the orders, credit approval which were remotely managed by the SAP system.

[92] COW-1 the Claimant's Head of department gave evidence that the Claimant's retrenchment was brought about by the abolition of the

Claimant's function and the deletion of her position within the Marketing Service Department (Domestic) and the Company.

[93] COW-1 explained that the downward trend of the sales, significantly reduced the need for support services rendered in coordinating and monitoring the orders, controlling the mechanism to process the orders and the delivery to customers, data entry, credit approval, stock clearance, and handling of customer's complaints.

[94] COW-1 further explained that the need for work force in the Marketing Services Department was assessed and after reviewing the job functions of each member of the team, the Claimant and two other members of the team were identified to be redundant.

[95] COW-1 further states that the Company merely retained four executives to verify the clients' details and product details, ensure accuracy in accordance to the SAP system, and coordinate delivery.

[96] COW-1 explained that the Company did not need an employee in managerial capacity merely to oversee the entry of the data or the process of delivery or any other tasks carried out by the executives.

[97] COW-1 explained that the Claimant's functions and position was rendered redundant as her managerial capacity functions was no longer needed by the management in its effort to create an efficient and leaner management structure in order to cope with the cessation of some of the Company's manufacturing operations.

[98] COW-1 in his evidence states that from the post retrenchment Organization Chart in page 233 COB-8, no one was appointed to take over the position of Manager in the Marketing Services Department as the function cease to exists and the position was abolished.

[99] COW-1 explained that the four executives and the senior sales coordinator retained did not take over the Claimant's functions because her function no longer exists.

[100] COW-1 also states that the SAP system had allowed for integration with the ecommerce system and the customer can directly go through the SAP system without the need for clarification where the Claimant's function of managing reporting and supervisory was no longer required.

[101] COW-1 states that with the SAP system, every other function was automated so the roles of supervision of the Manager in the Marketing Services Department are no longer required while the functions of data entry, faxes, phone calls were always handled by the coordinators.

[102] COW-4 states the Claimant's function that mostly involved manual business processes in the sales and supply. The SAP system allows the Company to optimize productivity, reduce bottleneck that were caused by manual process and increase collaboration and good

governance in the sales and supply, manufacturing, planning, procurement and finance sectors sector of the Company.

[103] COW-4 explained that the SAP system was designed to resolve complex customer orders, product mix and offerings, pricing strategy and inconsistencies in the manual process for creating customer quotes in the sales and supply sector dealt by the Claimant.

[104] The Company pleaded that the retrenchment exercise on 16.10.2018 is a necessary step taken by the Company due to the financial condition of the Company.

[105] The Company through its witnesses put forth evidence of the Company's downward trends in sales and profits, increase of manufacturing and production costs, the reduction of productions and workloads, SAP system and the challenging conditions of the tiles industries and markets as reasons that led the Company to restructure for leaner organizational and management.

[106] The Company has adduced various documentary evidence to show the financial condition, sales and profit of the Company, the increasing of costs and expenses as well as the conditions of the tiles industries, which were all not disputed by the Claimant.

[107] The Claimant did not dispute the Company's downward trends in sales and profits, increase of manufacturing and production costs, the challenging conditions of the tiles industries and markets and the

misfortune befallen the Company's many competitors in the same industries.

[108] The Company has shown numerous cost-cutting measures embarked by the Company in order to stave off the need for retrenchment including cessation of kilns in Kluang and Meru factories, closure of branches and warehouse and transferring of branches or gallery to smaller space with cheaper rents. This was never challenged by the Claimant.

[109] COW-2 and COW-3 provided clear and consistent evidence of the Company's financial conditions, revenues, sales and losses of the Company supported with the relevant financial documents.

[110] The Company's declining financial performance caused by declining sales and demands as shown in page 90-91 COB-7 and page 190 COB-8 and the increase in its operational costs over the 5 years as reflected in page 188-189 COB-8 was not challenged by the Claimant. As such it is proven that the Company indeed suffered loss in profits and sales.

[111] The Claimant too did not dispute the figures relating to the drop in sales, profits and the increase in costs presented by COW-2 and COW-3 neither did the Claimant challenge the figures showing the financial status of the Company as being inaccurate

[112] From the detail evidence of COW-2 about the Company's

financial situation, supported by COW-3's evidence, which was unchallenged by the Claimant, the Court is of the view that the retrenchment exercise is a necessary step taken by the Company to sustain the business.

[113] The Court finds that there is nothing to doubt in COW-2 and COW-3's evidence supported by various documents adduced which all shows that the Company was going through financial difficulties. The fact that the Company's profits was deteriorating, the Claimant's contention that the Company was not in any financial difficulties is unsubstantiated.

[114] The Court is of the view that that due to the continued deterioration of profits, the Company's financial performance was unsustainable, as such, it is justified for the Company to review its operations and take drastic measures to improve the Company's efficiency in all its affairs.

[115] The Claimant also did not challenge the evidence of the Company's Financial Controller Mr. Lam Kong Chark (COWS-2) that the the reasons leading to the need for the Company to carry out retrenchment exercise is due to market downturn, declining sales and profits, stiff competition due to influx of foreign tiles and increasing of production costs.

[116] The Claimant also did not challenged all this evidence because she is aware of the Company's situation since she had been working within the tiles industries for many years and surely have knowledge of the difficulties faced by the Company.

[117] There is no evidence led by the Claimant to prove that the decision by the Company was bad faith.

[118] The Claimant also did not challenge the Company's decision embarking into reorganising the organisation structure to create a leaner structure to meet the needs of the business and the new direction it intended to take to safeguard its business.

[119] It was also undisputed fact that the Claimant was not the only employee retrenched but there were other employees too affected by the restructuring exercise. The fact that no new employees employed to replace the Claimant, it goes to prove that the retrenchment is not motivated by any bad intention or victimisation by the Company on the Claimant.

[120] The Court opined that the Company has the prerogative to reorganize its business operations in any manner for the purpose of its economic viability and in the manner, the Company think best so long as that managerial power is exercised bona fide.

[121] COW-1 and COW-4's evidence that the management identified the Claimant's position as surplus because the Claimant's functions

which was mainly to oversee all the business processes the Marketing Services Department are carried out by the executives was not challenged by the Claimant. As such the reorganization of the Company's work force that ceased the Claimant's position as Manager in the Marketing Services Department was a *bona fide* exercise.

[122] It was also undisputed that from Company's organisation chart after the retrenchment at page 233 COB-8, the functions of Manager, Marketing Services Domestic Department were deleted and no one was appointed to carry out her functions thereafter.

[123] The Company's evidence to show that the Claimant was identified to be retrenched because her functions are found to be redundant as it is performed in duplicity and are functions that no longer required by the business remained unchallenged.

[124] It was not disputed that the Claimant is not the only person from the Marketing Services Domestic Department who were retrenched.

[125] The Claimant contended that as a senior employee of the Company, she was victimized when the Company departed from the LIFO principle and that the Company did not provide any cogent reason as to why they had departed from the LIFO principle.

[126] The Claimant claimed her retrenchment was motivated with bad faith because she was the most senior in terms of years of service and

that her job function still exists but the Company did not take steps to place her in other position within the same department or redeploy her within the Company or the Group of companies.

[127] The Claimant asserts that the Company failed to follow the LIFO principle not only with regards to the employees in the Marketing Services Department for Domestic where she was, but also in the entire Supply Chain Department of which the Marketing Services Department (MSD) for Domestic was a part of it when carrying out the retrenchment exercise.

[128] From the evidence adduced by the Claimant, apart from merely stating that she should have been usurped the work of others or placed in other department within the Company, the Claimant did not adduce any evidence to show that her retrenchment was motivated with bad faith by the Company.

[129] It is a trite law that in determining whether LIFO principle has been breached, the Court must compare employees of the same category, rank or stature

[130] It is the finding of this Court that the LIFO principle does not apply to the Claimant as a Manager, Marketing Services because there no other person in the same category as the Claimant.

[131] The Claimant too cannot compare her years of service to that of her subordinates Ms. Chan Kar Yee, Ms. Aileen Chua, Mr. Tuen Yee Fan and Mr. Hor Sook Lee) who are only executive levels, carrying the position and functions of Sales Coordinators and Sales Executives.

[132] The Claimant also was wrong to compare her years of service to and all employees in the Supply Chain Department consisting of Demand Planning, Marketing Services Domestic Department, Marketing Services International Department and Shipping Department as shown in page 212, COB-8) because they are not comparable employees within the same category as her and does not carry the same position or functions as hers.

[133] It was not disputed that 2 out of 6 of her subordinates namely Ms. Raja Norhidayu Bt Raja Alang Shah and Ms. Norul Jan'nah Binti Mohd Nasri were also retrenched at the same time as the Claimant.

[134] The Claimant did not dispute or challenged the evidence of her Head of Department [COW-1] as to why her service was no longer required by the department and why was she selected to be retrenched.

[135] Apart from only contending that there was no reduction in her job functions because she working as usual until the very last day before being retrenched, there was no evidence adduced to negate the Company's evidence especially of her head of department COW-1, that her function was no longer required by the Company and her

position was deleted from the Company's structure.

[136] From the organization chart pre-retrenchment at Tab 25 and organization chart post-retrenchment at Tab 26, COB-8), there was no evidence that Claimant's functions and positions were taken over by other employees or replaced with new employee after her retrenchment.

[137] The Claimant attempted to put forth averments that she can do each and all functions that exist the Marketing Services Department or in the entire Supply Chain Department. These averments were never pleaded in her pleadings neither was put forth to the Company's witnesses either COW-1 or COW-4.

[138] The Court is of the view that the LIFO principle does not apply to the Claimant and it is no obligation for the Company to look for alternative employment for the Claimant. The Company has not breached the LIFO principle in its decision to retrench the Claimant.

[139] The Claimant claimed that the SAP system did not her job functions prior to the retrenchment exercise as she was carrying her job functions as usual up to the date of the retrenchment. The Claimant contended that COW-1 was not able to show that the work force for the Company can be reduced with the introduction of the SAP system.

[140] On this contention, the Court finds that the introduction of SAP is not the main reason for the Claimant's retrenchment because if it was, the retrenchment would have been carried out in year 2017.

[141] The Claimant alleges that the Company has failed to adhere to the Code for Industrial Harmony for reasons that the Company did not give advance warning and prior consultation to the Claimant.

[142] In the present case, the the Company did inform the Union of the retrenchment exercise on 16.10.2018 and this was not disputed by the Claimants at all.

[143] On the Claimant's contention that the Company failed to warn on the impending retrenchment exercise or consult her to make any offer for alternative employment, the Court finds that the company was not obliged to do so. It is a trite law that the Company has no legal obligation to consult or forewarn the employees of the retrenchment exercise.

[144] It was not mala fide on the part of the Company not to consult or discuss with the Claimant on its determination to reorganise the Company. Furthermore, the Code of Conduct for Industrial Harmony imposes no legal or contractual obligation on the Company. The Company too was not obliged to make any offer for any alternative employment to the Claimant.

[145] The Court is also of the view that there is no obligation or justification for the Company to notify the Claimant on the selection criteria before deciding to carry out a retrenchment exercise.

[146] With the undisputed evidence and unchallenged evidence of the Company's financial situations, the Court is satisfied that there was genuineness on the part of the Company in exercising the restructuring the work force of its business entity. The retrenchment was properly carried out and it was a *bona fide* exercise.

[147] The Claimant avers that her retrenchment was done with *mala fide* and her position is not redundant because the Company had placed job advertisements after the retrenchments exercise.

[148] The Company's evidence that no new employee was recruited to take over the Claimant's position and functions as shown in the Company's post-retrenchment organization chart was not disputed by the Claimant.

[149] The Company's evidence that the job advertisements relate to the positions that became vacant when the employee holding that position resigned after the retrenchment exercise was also not challenged or disputed by the Claimant.

[150] In the absent of any evidence to the contrary, the Court is of the view there is no *mala fide* intention of the Company because the resignation of the employees holding that position were not within the

Company's contemplation when retrenchment took place. Furthermore, the advertisements posted by the Company in JobStreet was done pursuant to unanticipated resignation of several employees after the retrenchment exercise was carried out and are in respect of positions and functions not-related to the Claimants' (see pp. 168 – 175, Tab 19, COB-7.

[151] The Claimant too did not adduce any evidence or could not identify herself as being suited to any of the positions advertised.

[152] Neither was there any evidence adduced and the Claimant was not able to explain as to why she did not apply for any of the positions if at all that she wanted to prove the Company victimised her by retrenchment with a view to hire new employees to perform her functions at a lower salary.

[153] The Court is of the view that the Claimant was unable to show anything that can demonstrate to this Court's satisfaction that the Company's decision to terminate her employment was not actuated by ulterior motive or that could be construed as an exercise in bad faith.

[154] In the present case, there was surplus of the work including the works the Claimant was performing and the Company requires fewer employees. Under these circumstances, the Claimant's position was excess to the requirements the Company, therefore the Company is entitled to discharge such excess.

[155] The Court is satisfied that the reasons in the dismissal letter were not a manipulative act on part of the Company to victimize the Claimant. The Company exercised its managerial powers *bona fide* and the Claimant's termination was with just cause or excuse.

[156] Given this facts, the Court is satisfied retrenchment by the Company was a *bona fide* exercise of its managerial prerogative to run the business operations as it deemed fit in order to successfully continue the Company's overall business operations.

[157] Taking into account the totality of the evidence adduced by both parties and bearing in mind s. 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and the substantial merits, the Court finds that the Company had established on a balance of probabilities the reasons for the Claimant's termination on grounds of redundancy.

The Claimant's case is hereby dismissed.

HANDED DOWN AND DATED 16 NOVEMBER 2020

-Signed-

**(REIHANA BTE ABD.RAZAK)
CHAIRMAN
INDUSTRIAL COURT MALAYSIA
KUALA LUMPUR**