**IN THE INDUSTRIAL COURT MLAYSIA**

**AT KUALA LUMPUR**

**CASE NO: 15/4-553/19**

**BETWEEN**

**YOGASWARAN A/L NADRAJA**

**AND**

**GUOCERA SDN. BHD.**

**AWARD NO : 1678 OF 2020**

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|---|---|---|
| Before | : | **Y.A. PUAN REIHANA BTE ABD. RAZAK**<br>**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<br>Messrs. Suria Kumar & Co.<br>Counsel for the Claimant |
| | | Mrs. Mehala Marimuthoo together with<br>Ms. Nurhamizah Bustami<br>Messrs. Shook Lin & Bok<br>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 **YOGASWARAN A/L NADRAJA** (The Claimant) by **GUOCERA SDN. BHD.** (The Company) on **16.10.2018.**

**AWARD**

**BACKGROUND**

**[1]** This case **15/4-553/19 YOGASWARAN A/L NADRAJA** was jointly heard with case no **15/4-551/19 NG SAI LEE, 15/4-552/19 KAN FUI CHENG, 15/4-554/19 ONG CHENG HOON** and **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 01.04.2008 as a Credit Control Executive drawing a monthly salary of RM3,800.00. At the time of his dismissal, he held the position of Senior Executive of Credit Control with a salary of RM6,580.00 per month.

**[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, his Head of Department in the present of the Company's IT Manager and Financial Officer handed him a Notice of Retrenchment.

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

**[6]** The Claimant contends that his 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 were 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 Company 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 also averred that a new system was introduced by the Company in 2017 where the business software in the system had integrated all areas of business and provides end-to-end solutions for all the processes in a business very less human intervention and managerial supervision.

**[11]** The Company avers that the Claimant's position as Senior Executive of Credit Control 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 RM50 212.45 which he accepted without any protest or complaint over the sum he 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 his function ceases to exist. The Claimant's dismissal was because of the retrenchment exercise carried out by the Company.

**THE LAW**

**[14]** 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.

**[15]** 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'."***

**[16]** The dismissal 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".***

**[17]** 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."***

**[18]** In ***PENGKALEN 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."***

**[19]** 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."***

**[20]** 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 qainsaid 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 qrounded.***

**[21]** 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".***

**[22]** 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

**[23]** 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.

**[24] 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."***

**[25]** 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.

**[26]** The Company submits that the said letter 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.

**[27]** 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 bv the parties to the reference ".***

**[28]** 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".***

**[29]** 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.

**[30]** 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.

**[31]** 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.

**[32]** The Company submits that the said letter 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.

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

**[34]** 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".*

**[35]** 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.

**[36]** 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.

**[37]** 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.

**[38]** 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.

**[39]** 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.

**[40]** 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.

**[41]** 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.

**[42]** 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.

**[43]** 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.

**[44]** 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.

**[45]** 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.

**[46]** 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.

**[47]** 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

**[48]** 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.

**[49]** 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.

**[50]** 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.

**[51]** 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.

**[52]** 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.

**[53]** 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]** The Claimant avers that there was no reduction in his job functions as the Senior Executive of Credit Control prior to the retrenchment exercise and that he was carrying out his job functions as usual up to the date of the retrenchment.

**[59]** The Claimant avers that he has experience in both the domestic and international markets because he was transferred from the domestic market to the international market and vice versa.

**[60]** The Claimant avers that he served the Company for ten years and was the senior in his department.

**[61]** The Claimant avers that when he was handling the domestic market, he had opened sixty accounts for small retailers.

**[62]** It was the Claimant's contention that he served the Company for ten years and was the most senior in terms of years of service in the department, but the Company retrenched him and retained the junior employees in terms of years of service to him.

**[63]** The Claimant contended that there was no minimization of his functions neither was his functions in the domestic and international in the Credit Control Department reduced.

**[64]** The Claimant contended that his position was not abolished neither was his ceased to exist because the Credit Control Department still exists and all the employees who were in the Department prior to the retrenchment exercise remained there.

**[65]** The Claimant contended that his job functions in Credit Control for International and Domestic markets still exists and it is being carried out by Ms. Jeya, who was junior to him in terms of grading and years of service.

**[66]** The Claimant contended that at the time of the retrenchment exercise, he was heading the international accounts and that Ms. Jeya who was retained was trained by him and reports to him who was later promoted as an executive**.**

**[67]** The Claimant contended that the Company failed to follow the LIFO principle with regards to the employees in the Credit Control Department when carrying out the retrenchment exercise.

**[68]** The Claimant contended that as a senior employee of the Company, he 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.

**[69]** 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.

**[70]** 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**.**

**[71]** 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.

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

**[73]** The Claimant states that prior to the retrenchment exercise, neither his Head of Department one Lim Shuh Fan or the Company's Financial Controller Lam Kong Chak (COW-2), called or consulted him to explain why he was selected to be retrenched while Ms. Jeya will be retained to take over his job functions and his junior one Choong Wei Yee (Esther Choong) will be retained too.

**[74]** The Claimant asserts that the reason why he was retrenched was not because of his job function cease to exist or diminished, but it was because the Company want to get rid of him as they was unhappy with him on his working relationship in the Company and that he was also on a long sick leave.

**[75]** The Claimant also avers that the Company also confirmed a temporary clerk called Shaila as Accounts Assistant in the Credit Control Department post retrenchment.

**[76]** The Claimant avers that he was the only employee in the entire Finance & Credit Control Department who was retrenched.

**[77]** The Claimant avers that the reason put forward by the Company the SAP system reduced job functions in the Finance & Credit Control Department and the Claimant's position is abolished and no longer require by the Company.

**[78]** The Claimant contended that the Company failed to produce any evidence to show the SAP system had taken over the job functions of the Finance & Credit Control Department which led to his dismissal.

**[79]** The Claimant avers that the Company did not show how the SAP system SAP system reduced the need of human intervention in the the Finance & Credit Control Department leading to his position and job function ceases to exists.

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

**[81]** 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 his functions.

**[82]** 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 shown in page 90-91COB-7 while its operational costs had increased over 5 years as tabulated in page 188-189 COB-8.

**[83]** 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.

**[84]** 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.

**[85]** 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.

**[86]** 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.

**[87]** 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.

**[88]** The Company's Head of Retail Sales, Mr. Tan Kok Sang, [COW-3] 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.

**[89]** 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.

**[90]** 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.

**[91]** 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.

**[92]** 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.

**[93]** 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.

**[94]** 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.

**[95]** 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.

**[96]** 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.

**[97]** COW-2 the Company's Financial Controller, gave evidence that the Claimant's retrenchment was brought about by the minimization of the functions carried out in the Credit Control Department where the domestic and international functions reduced significantly.

**[98]** The Claimant claimed that he had experience in credit control both domestic and international markets.

**[99]** COW-2 in his evidence avers that the Claimant has no in-depth experience in credit control for international market because he was at all time handling credit control for domestic market until in 2017.

**[100]** COW-2 explained at length that when the Company decided to test the Claimant's capability and ability to adapt to international credit control works, he was found incapable and handicapped.

**[101]** COW-2 explained further that before Ms. Jeya took over the credit control for the domestic, she was already in the credit control of the international while the claimant was in charge of the credit control of domestic.

**[102]** COW-2 states that, he frequently gets complaints about the Claimant especially from the sales team, the head of the domestic sales, and colleagues in the sales team about the Claimant's work relation which did not work well with the sales team.

**[103]** COW-2 explained further that when the Claimant, was on a long sick leave, after discussing with the finance manager, COW-2 placed Ms. Jeya to take charge of the domestic sales credit because domestic sales represent something like 70 % of the total Company's sales at that time.

**[104]** COW-2 states that Ms. Jeya has to cross over to help and to assist on domestic sales credit control matters. COW-2 states that the domestic sales credit matters was well taken care by Ms Jeya as she was a meticulous, organized person and know her job well.

**[105]** COW-2 states that when the Company decides to resize its work in the Credit Control Department, COW-2 decided to keep Ms. Jeya over the Claimant as she was more well verse with the jobs in the credit department as compared to the Claimant.

**[106]** 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.

**[107]** 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.

**[108]** 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.

**[109]** 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.

**[110]** 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.

**[111]** 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.

**[112]** The Company's declining financial performance caused by declining sales and demands as shown in page 90-91COB-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.

**[113]** 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

**[114]** 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.

**[115]** 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.

**[116]** 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.

**[117]** The Claimant also did not challenge the evidence of the Company's Financial Controller Mr. Lam Kong Chark (COWS-2) that 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.

**[118]** The Claimant also did not challenge 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.

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

**[120]** 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.

**[121]** 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.

**[122]** 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.

**[123]** It was also undisputed that from Company's organisation chart after the retrenchment at page *233 COB*-8, no one new was appointed to carry out his functions thereafter.

**[124]** The Claimant alleged that the Company has failed to comply with the LIFO principle whilst carrying out the retrenchment exercise as he compared his years of service to that of Ms. Esther Cheong Wai Yee ,Ms. Shaila Banu and all other employees in the Finance & Credit Control Department except for Ms Nor, Noor and Ms. Jeya.

**[125]** 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 status.

**[126]** The Claimant cannot compare his years to Ms. Esther Cheong because she is not a Credit Control Executive but an Export Documentation Executive reporting to Ms. Jeya. Ms. Esther Cheong also carries different functions and roles from that of the Claimant.

**[127]** The Claimant too cannot compare his years to Ms. Shaila Banu because she is also not a Credit Control executive but a temporary clerk who was later confirmed as Account Assistant in the Finance Department

which is also a different department and carrying different functions to that of the Claimant's.

**[128]** Neither can the Claimant compare his years to all employees in finance and Credit Control Department as all of them carries different functions, position, having different qualifications, experience and expertise from that of the Claimant. The Claimant admitted to these facts under cross examination.

**[129]** The Court is of the view that it is unreasonable for the Claimant to expect the Company to retain him in the positions of Ms. Esther Cheong as an Export Documentation Executive and of Ms. Nora as a Credit Admin Assistant, who both hold lower position, grade, roles and functions not equivalent to the Claimant's position, grade, benefits, roles and functions as a Senior Executive.

**[130]** The Court is satisfied that the Company has complied with the LIFO principle in respect of the Claimant because Ms. Jeya undisputedly have more years of services in the Credit Control Department where Ms. Jeya has combined knowledge of both the domestic and international credit as she has been in the department since year 2002.

**[131]** The Court also has no doubt on COW's evidence that the Company retrenched the Claimant to resize the Credit Control department as headcount for the Claimant's department dropped from four to three.

**[132]** The Court finds that Ms. Jeya was retained in the department to carry out the combined role and supported by the Export Documentation Executive and the Credit Administration Assistant based on her expertise which the claimant did not have.

**[133]** The Claimant too did not challenge COW-2 evidence at all about Ms. Jeya's performance over his performance. Neither did the Claimant adduced any evidence to the contrary about Ms. Jeya's expertise, capabilities and experience as described by COW-2 over his. As such the Company's selection of Ms. jeya over the Claimant was a fair selection in this case as it was not disputed by the Claimant.

**[134]** As it was not disputed that Ms. Jeya has longer years of service than the Claimant, therefore, the Company has adhered to the LIFO principle in selecting the Claimant for retrenchment.

**[135]** COW's evidence that Ms. Jeya has always carried out the works in both domestic and international markets and due to the minimization of the functions in the Credit Control Department, the Company no longer need to retain 2 employees to carry out these functions was not challenged by the Claimant.

**[136]** The Court is of the view that the LIFO principle does not apply towards the Claimant and Ms. Esther Cheong because they do not belong under the same category.

**[137]** As COW-2's selection was not disputed, the Court opined that COW-2 made fair and objective assessment of why he decided to choose Ms. Jeya over the Claimant.

**[138]** It was also unchallenged evidence that COW-2 gave an opportunity to the Claimant to perform functions in respect of the international market in order to assess his ability and aptitude in his position.

**[139]** COW-2's finding that the Claimant was found to be laking of ability and knowledge compared to Ms. Jeya who was able to perform credit control functions for both international and domestic markets very well was also not challenged by the Claimant.

**[140]** As such, the Court finds that the Company selection was fair and therefore the retrenchment of the Claimant was carried out in good faith.

**[141]** 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.

**[142]** The Claimant claimed that the SAP system did not his job functions prior to the retrenchment exercise as he was carrying his 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.

**[143]** 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.

**[144]** 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.

**[145]** 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.

**[146]** On the Claimant's contention that the Company failed to warn on the impending retrenchment exercise or consult him 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.

**[147]** 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.

**[148]** 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.

**[149]** 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 a was properly carried out and it was a *bona fide* exercise.

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

**[151]** 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.

**[152]** 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.

**[153]** 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 Claimant's.

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

**[155]** 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 him employment was not actuated by ulterior motive or that could be construed as an exercise in bad faith.

**[156]** 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.

**[157]** 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.

**[158]** 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.

**[159]** 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**