IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO.: 22(12)/4-1472/19

BETWEEN

THANASEGARAN A/L C. MUNUSAMY

AND

VALE MALAYSIA MINERALS SDN. BHD.

AWARD NO.: 1647 OF 2020

Before	:	Y.A. Tuan Paramalingam A/L J. Doraisamy - Chairman
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	07.08.2019
Date of Mention	:	24.09.2019; 22.10.2019; 18.11.2019; 02.12.2019; 26.12.2019; 08.01.2020; 15.01.2020; 29.01.2020; 12.02.2020 & 24.02.2020
Date of Hearing	:	12.03.2020; 13.08.2020; 14.08.2020; 04.09.2020; 29.09.2020; 02.10.2020; 07.10.2020
Representation	:	Mr. Chandra Segaran together with Mr. Harjit Singh Messrs. Prem & Chandra Counsel for the Claimant Ms. Han Li Meng together with Mr. John Rolan Messrs. Christopher & Lee Ong Counsel for the Company

REFERENCE :

This is a reference made under Section 20 (3) of the Industrial Relations Act 1967 (Act 177), arising out of the dismissal of **Thanasegaran a/l C. Munusamy** (hereinafter referred to as "*the Claimant*") by **Vale Malaysia Minerals Sdn. Bhd.** (hereinafter referred to as "*the Company*") on 31 January 2019.

AWARD

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint of dismissal by the Company on 31 January 2019.

I. PROCEDURAL HISTORY

[2] The Court received the letter pertaining to the Ministerial reference under Section 20(3) of the Industrial Relations Act 1967 on 16 August 2019.

[3] The matter was fixed for mention on 24 September 2019, 22 October 2019, 18 November 2019, 2 December 2019, 26 December 2019, 8 January 2020, 15 January 2020, 29 January 2020, 12 February 2020 and 24 February 2020.

[4] The case was then transferred from Court No. 12 to Court No. 22 on 27 February 2020 to be heard together with two other cases, i.e. Case No. 22(9)/4-1071/19 and Case No. 22(12)/4-1471/19.

[5] The trial proceeded for all 3 matters concurrently on 11 March 2020, 13 August 2020, 14 August 2020, 4 September 2020, 29 September 2020, 2 October 2020 and concluded on 7 October 2020.

II. THE PARTIES' POSITION THE MERITS

(a) The Claimant

[6] The Claimant commenced his employment with the Company as a Maintenance Shift Supervisor on 3 April 2017 with a basic monthly salary of RM8,900.00, fixed monthly transport allowance of RM300.00 besides a minimum shift allowance of RM250.00 per month.

[7] For the year ending 2017, a prorated Annual Incentive Payment (AIP) of RM50,301.05 was paid to the Claimant. As per the Company's Employee Handbook, the AIP quantum and payment are at the discretion of the Company and is based on individual and Company's performance as well as benchmarked Key Performance Indicators.

[8] Effective from 1 January 2018, the Claimant's monthly salary was increased by 2.0% in response to inflation to RM9,093.00 (Annual Salary of RM118,209.00 based on 13 months contractual payments per year). As per the Company Employee Handbook, Salary Reviews are not contractual or an entitlement to employees. It is awarded at the sole discretion of the Company based on reward merit administration, market and/or business condition.

[9] In December 2018, the Claimant's position was upgraded from Maintenance Shift Supervisor to Head of Shift Maintenance.

[10] On 28 January 2019 at about 2.30pm, the Claimant was called up to the Meeting Room at the Main Office. The Claimant's Manager (i.e. En. Muhammad Sashi Nair (COW-1), Puan Saripah Rodiah Ahmad (COW-2; Supervisor, HR Department) and Puan Nur Liyana Mardhiah Abu Samah (COW-3; HR Department) were present at the Meeting Room. At the meeting, COW-2 informed the Claimant that the Company's Appraisal Committee had decided to release him due to his poor performance. The Claimant however objected to the said decision as his appraisal for the year ending 2018 had yet to be reviewed by his Manager, i.e. COW-1. Further, COW-1 had just a few days earlier expressed his opinion that he was satisfied with the Claimant's work performance. On hearing the Claimant's comments, COW-1 informed the Claimant that it was the decision of the Brazilian Managers.

[11] Two options were thereafter given by COW-2:-

> **Option 1** : To resign voluntarily and the Company would pay compensation of 1 month salary *in lieu* of notice and encashment of the Claimant's unutilised Annual Leave besides the payment of the AIP which was due for payment in February 2019. The Claimant was also told that a good testimonial would be issued to him. An assurance was also given to the Claimant that a good reference would be given if contacted by any of the Claimant's potential future employers.
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> **Option 2** : If the Claimant refuse to resign voluntarily, then he would be immediately suspended for a period of 14 days pending a domestic inquiry on poor performance. He was also told that at the domestic

inquiry, the Claimant has to prove that his work performance was good and if he is unable to prove it, he would be found guilty and dismissed. As a consequence, there would be no payment of one month's salary in lieu of notice period, encashment of his Annual Leave and the payment of the AIP due in February 2019. Further good reference would not be given to any of his potential future employers. A good testimonial letter would also not be issued to him and he would have trouble getting new employment.

[12] As the Claimant was shocked, confused and under stress, he informed them that he needed some time to make his decision. COW-2 gave him 24 hours to decide. In the meantime, he was also told not to report to work until further notice. He was also told that the Country Manager would be contacted with the view of increasing the compensation.

[13] On 29 January 2019, the Claimant was still in a confused state when he received a call at about 12.30pm for another meeting both from COW-2 as well as COW-1. They told him that the Country Manager had agreed to increase his compensation by one month's salary by way of *ex gratia* payment. He was also told to attend the next meeting at about 3.30pm for further negotiations. The Claimant thereafter went to the Meeting Room at about 3.30pm. The same management team comprising of COW-2, COW-1 and COW-3 were present at the meeting room. A few minutes later, two of the Claimant's colleagues, i.e. Vijaya Kumar a/l Subramaniam (CLW-2) and Thiruchelvam a/l Ramaiah (CLW-3), who were also facing the same

issue on poor performance, walked in to the Meeting Room. The Claimant, CLW-2 and CLW-3 were informed that the Country Manager had decided to increase their compensation by one month's salary as *ex gratia* payment. They were reminded that if they sign their respective Termination Agreements, each one of them would be paid one month's salary *in lieu* of notice period, one month's salary as *ex gratia* payment and encashment of unutilised Annual Leave. They were also told that the AIP which was payable at the end of February 2019 would also be paid to each one of them. A good testimonial letter would also be issued and the Company would give a good reference to any of their future potential employers.

[14] The Claimant, CLW-2 and CLW-3 were reminded that if any one of them refused to sign their respective Termination Agreements, they would be suspended for a period of 14 days and a domestic inquiry would be held against them on the charge of poor performance. And in the event they are found guilty, no compensation whatsoever would be paid to them. COW-2 also informed them that the probable outcome of the domestic inquiry may not be in their favour and the onus is on each one of them to prove that their work performance was good.

[15] Due to his confused state of mind as a result of being under great pressure and stress as he had to decide whether to accept Option 1 or Option 2 and also worried on how he was going to support his family and his outstanding debts if he was dismissed after holding of the domestic inquiry, the Claimant signed the Termination Agreement on a 'without prejudice' basis.

[16] Prior to signing the termination Agreement however, the Claimant did object to some of the clauses contained therein. COW-2 however told him that he is not allowed to do so but instead agreed that the Claimant could sign the said Agreement on a 'without prejudice' basis.

[17] The sum of RM21,683.31 consisting of one month's salary of RM9,093.00, *ex gratia* payment of one month's salary of RM9,093.00 and payment of unutilised leave amounting to RM3,497.31 was paid to the Claimant.

[18] Even though the payment *in lieu* of notice was 3 months' salary as per the Claimant's Contract of Employment, the Company however unilaterally reduced the said notice period from 3 months to 1 month only.

[19] On the same day, i.e. 29 January 2019, 23:24hrs, the Claimant sent an email to Vale Ethics and Conduct (Vale's Ethics and Conduct Channel) complaining to them on the circumstances leading to him signing the Termination Agreement and also appealing to them to reconsider reinstating or considering a higher compensation as at all times his Manager, i.e. COW-1, had been commending on his good work performance. On 13th February 2018, the Claimant received a letter from COW-2 stating his last date of employment shall be on 15th March 2018.

[20] The Company issued a good testimonial letter dated 4 February 2019.

[21] For the year ending 2018, an AIP of RM60,333.87 was awarded to the Claimant sometime in February 2019.

[22] The Claimant contends that despite the Company alleging that his work performance was poor, they had not completed, discussed or shown his Appraisal for his work performance for the year 2018. He had not been issued any warning letter on poor or unsatisfactory performance. He also had not been issued with any show cause letter or a domestic inquiry held with regards to the alleged poor performance.

[23] The Claimant also contends that the awarding of annual salary adjustment for the year 2018 and the payment of bonuses by way of AIP of RM50,301.05 for the year ending 2017 and RM60,333.87 for the year ending 2018 indicated that the Claimant's work performance was satisfactory. This has been confirmed as his position was upgraded from Maintenance Shift Supervisor to Head of Shift Maintenance in December 2018.

[24] The Company has a Performance Improvement Plan (PIP) for employees whose work performance were poor. If the Claimant's work performance was unsatisfactory, he could have been placed under the PIP. However, he was not placed under PIP, which signified that his work performance was indeed satisfactory.

[25] The Termination Agreement had been unilaterally prepared by the Company and the Claimant had to sign it in order to receive the payments, especially the large AIP which was due to him in February 2019. He had no alternative as he would most probably be dismissed after the holding of a domestic inquiry, as hinted by COW-2 during the meeting on 29 January 2019.

[26] The Claimant contends that the Company's action was capricious, arbitrary and tainted by unfair labour practice. He prays that his termination be held to be done without just cause or excuse, and that he be reinstated to his former position of Head of Shift Maintenance with full back wages.

(b) The Company

[27] The Company contends that during the course of his employment, the Claimant had committed a series of conduct which amounted to poor performance.

[28] The Claimant's superior, i.e. COW-1, had always kept the Claimant informed of his performance standards in the course of their daily communication, including via emails.

[29] In view of the Claimant's poor performance, the Company had reached out to discuss with the Claimant about his performance issues. During the discussion between the Company and the Claimant, a proposal for a mutual separation agreement was discussed and agreed upon by the Company and the Claimant.

[30] In view of the agreement between the Company and the Claimant, a Termination Agreement dated 29 January 2019 was prepared. The terms and conditions of the said Termination Agreement was explained to the Claimant at the meeting held on 29 January 2019. The Claimant was then given time to reconsider the terms and conditions offered under the Termination Agreement. The Claimant had also consulted the Assistant Director of the Industrial Relations Department on 29 January 2019 prior to signing the Termination Agreement.

[31] The Company contends that the Claimant understood the terms and conditions of the Termination Agreement and voluntarily signed the said Termination Agreement on 29 January 2019.

[32] Subsequent to the execution of the Termination Agreement, the Company had made a payment in the sum of RM21,683.31 to the Claimant in February 2019.

[33] The Company also contends that the Claimant had always been aware of the status of his performance during the course of his employment.

III. THE FUNCTION OF THE INDUSTRIAL COURT & THE BURDEN OF PROOF

[34] The role of the Industrial Court pertaining to a reference under section 20 (3) of the Industrial Relations Act 1967 is to ask itself a question whether there was a dismissal; and, if so, whether it was with or without just cause or excuse (**Wong**

Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 MLJ 92; [1987] 1 MLRA 346).

[35] The Company's stand is that there had been no dismissal of the Claimant's employment by the Company as the Claimant's services had ceased by mutual agreement. As such, the fact of dismissal is in dispute. In such a case, the burden of proof lies on the Claimant to establish that he had in fact been dismissed by the Company. It was held by Abdul Kadir Sulaiman J in the High Court case of **Weltex Knitwear Industries Sdn. Bhd. v. Law Kar Toy & Anor [1998] 4 MLRH 774; [1998] 1 LNS 258**:-

> "*The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is prima facie done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge. However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not at all arise*".

IV. ISSUES TO BE DECIDED

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

(i) whether there is a dismissal on the facts; and

(ii) if so, whether the dismissal was with or without just cause or excuse.

V. THE COURT'S FINDINGS AND REASONS

(i) Whether there is a dismissal on the facts

[37] It is the Claimant's case that he was forced into executing the Termination Agreement wherein he was purportedly given 2 options by COW-2, i.e. either to sign a mutual termination agreement or face a domestic inquiry.

[38] The Company on the other hand contends that the Claimant had voluntarily entered into a mutual separation agreement, i.e. the Termination Agreement dated 29 January 2019. The Company further contends that no threats whatsoever were made by them towards the Claimant in order to force him to execute the said Termination Agreement.

[39] Counsel for the Company submits that it is imperative that there must be evidence of a threat of termination and that the lack of such an ultimatum, i.e. '*resign or be terminated*', would necessarily destroy the basis of the Claimant's case. Counsel relied on the case of **Harpers Trading (M) Sdn. Bhd., Butterworth v. Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan [1988] 2 ILR 314; [1988] 2 MELR 167** wherein the learned Industrial Court Chairman, Dato' Wong Chin Wee, held:-

> "*It is a well-established principle of industrial law that if it is proved that an employer offered the employee the alternatives of "resign or be*

sacked" and, without anything more, the employee resigned, that would constitute a dismissal. ***The principle is said to be one of causation - the causation being the threat of the sack. It is the existence of the threat of being sacked which causes the employee to be willing to resign****. But where that willingness is brought about by some other consideration, and the actual causation is not so much the sacking but other accepted considerations in the state of mind of the resigning employee, then it has to be said that he resigned voluntarily because it was beneficial to him to do so, that then there has therefore been no dismissal"*.

(Emphasis added)

[40] The Company contends that there were no offers or requests made for the Claimant to resign. The Company however admits that they did notify the Claimant that a domestic inquiry will be commenced and that the Claimant can defend himself and prove that the allegations purportedly made by the CSP Committee were untrue. The Company further contends that the right to commence a domestic inquiry against the Claimant is the management prerogative of the Company and that the punishment of termination cannot be assumed purely on the basis that the domestic inquiry was commenced.

[41] Counsel for the Company referred to the case of **Foong Pek Foong v. Tropicana Golf And Country Resort Berhad [2018] 2 LNS 0264** where the learned Industrial Court Chairman, Andersen Ong Wai Leong, held as follows:-

"*When an employee is subject to domestic inquiry, it is not necessary that the employee will be dismissed. It depends on whether the charges levelled against the employee are proven and the finding of guilty by the domestic inquiry panel. Therefore, threat of domestic inquiry cannot be equated with threat of dismissal if the employee did not resign. There must be cogent evidence of the employee being put under compulsion to resign and that if he declines to do so, the employer would proceed to dismiss him in any event*

On the facts, even if COW2's statement to the Claimant that she would be suspended immediately and there will be another domestic inquiry held to investigate her wrongdoings if she does not resign was perceived as a threat by the Claimant, it was a legitimate statement as the Company has every right to suspend and convene a domestic inquiry to investigate the wrongdoings of any of their employees including the Claimant. If the Claimant had stayed on in the Company, obviously the Company has the right to suspend and convene a domestic inquiry to investigate any allegations of wrongdoings. Therefore, to say that the Claimant's resignation is a forced resignation as a result of COW2's statement to her is preposterous".

[42] It is pertinent to note the oral testimonies of the 3 Company witnesses as pertaining to the reason why the suggestion of putting the Claimant on a domestic inquiry came about and who in fact even made such a suggestion. All 3 Company witnesses, i.e. COW-1, COW-2 and COW-3, did not deny that the Claimant was

suggested to be put on a domestic inquiry. The witnesses even testified clearly that the Claimant would have the opportunity at the domestic inquiry to disprove the CSP Committee's allegation that he was not a performer in his role.

[43] COW-1 quite peculiarly testified that there was no issue of poor performance on the part of the Claimant, and that it was rather about his attitude. This issue of the Claimant's attitude was purportedly raised at the CSP Committee meeting. However, the minutes of this CSP Committee meeting (*at Tab 2 of COB-2*) does not indicate at all as to when this meeting took place, who attended the meeting and, more crucially, whether the Claimant was even at that meeting to defend himself. It does not even contain any signatures and no confirmation whatsoever that the minutes were accurate. COW-3 testified that there were 2 separate meetings but the document does not indicate it to be such. She could not even state with certainty when these 2 meetings specifically took place, except that it was "*in early January 2019*".

[44] Even if the Claimant had no business to be present at the CSP Committee meeting, was he informed of the CSP Committee's comments after the purported meeting? There are no evidence to indicate that the Claimant knew of the CSP Committee's comments until it was narrated by COW-1 and COW-2 on 28 January 2019, i.e. one day before he was asked to execute the Termination Agreement. The Company could not show this Court that this CSP Committee meeting minutes were even given to the Claimant.

[45] The Company also failed to show that the Claimant was given any warning pertaining to his attitude or performance in order to accord him an opportunity to improve himself. It is imperative that if an employee's work performance or attitude is deemed to be unsatisfactory, sufficient warning and opportunity must be given by the employer for the employee to improve in the areas concerned and if he continues to slack in his performance and/or attitude, only then would the employer be justified to put that employee on a domestic inquiry to show cause why he ought not to be dismissed from his employment.

[46] The Company here evidently failed to give any warning or opportunity to the Claimant to improve on the alleged issue of attitude. The Claimant was informed by COW-2 and COW-1 on 28 January 2019 that the CSP Committee had made allegations of unsatisfactory attitude against him and that a domestic inquiry would be held where he would be given the opportunity to prove the CSP Committee wrong. This is where the Company contends that the Claimant suggested a mutual separation agreement rather than being put under a domestic inquiry.

[47] The Company ought to have put the Claimant under a PIP or a performance counselling, which clearly existed in the Company. By failing to put the Claimant under a PIP or a performance counselling, they had denied the Claimant an opportunity to improve himself on the issues alleged by the CSP Committee. What was objectionable to the Company was only the Claimant's work attitude. It was not an even an issue of a serious misconduct in the workplace, as is evident from the fact that the Company did not even proffer any charges against the Claimant.

[48] COW-1 testified that the Claimant never had any issues on work performance or skills. It was just his attitude that COW-1 found objectionable. However, COW-1 testified that it was COW-2 who advised him that the Claimant could not be put under a PIP, despite his assessment that the Claimant ought to be put under a PIP. COW-1 also testified that it was COW-2 who advised that the Claimant ought to be put under a domestic inquiry.

[49] COW-2 on the other hand testified that she advised COW-1 that he ought to conduct a performance counselling on the Claimant. COW-2 denied advising COW-1 that the Claimant could not be put under a PIP. Instead, she turned the table around and testified that it was COW-1 who told her that the Claimant could not be put under a PIP.

[50] COW-2 also testified that COW-1 did not do the performance counselling. Neither was the Claimant put under a PIP. COW-2 further testified that she advised COW-1 to put the Claimant on a domestic inquiry, and that it was never the decision of the CSP Committee. Her reasoning to put the Claimant on a Domestic Inquiry was that "*it is the best platform for the Claimants to use the opportunity to prove themselves*".

[51] COW-3 then rather interestingly testified that it was the CSP Committee who made the decision to put the Claimant on a domestic inquiry and that the domestic inquiry would be the best platform for the Claimant to prove that the CSP Committee was not right in making the allegation. This is wholly inconsistent with the testimonies

of COW-2 and COW-1 in that they had testified that the decision to put the Claimant on a domestic inquiry was never made by the CSP Committee. Even the CSP Committee meeting minutes (*Tab 2 of COB-2*), as ambiguous as it is, does not show that it was the CSP Committee's decision to put the Claimant on a Domestic Inquiry. Rather, the decision seems to have come solely from COW-2 herself.

[52] The testimonies of the Company's witnesses were evidently contradictory to each other. None of them explained or justified the Company's failure to put the Claimant, at best, on a performance counselling. Instead, a domestic inquiry was considered appropriate by them. To borrow the words of the Claimant's Counsel, why use a sledgehammer to swat a fly?

[53] With no PIP or performance counselling being done on the Claimant, COW-1 and COW-2 then saw it fit to call the Claimant for a meeting on 28 January 2019 to inform him that the CSP Committee finds the Claimant's work attitude unsatisfactory.

[54] COW-2 in her witness statement (*COWS-2[C]; Q & A No. 4*) narrated what transpired at the said meeting of 28 January 2019, the contents of which are rather telling with regards to the state of mind the Claimant was under after what COW-2 told him at the said meeting:-

> "*Q : Can you tell the Court what transpired on 28 January 2019?*
>
> *A : After the CSP Committee meeting on 24 January 2019, we called the Claimant to attend a meeting on 28 January 2019. Mr.*

Muhammad Sashi Nair ("Mr. Sashi"), Liyana and I attended the meeting on 28 January 2019 with the Claimant.

During the meeting, I informed the Claimant of the conclusion made by the CSP Committee. This was confirmed by Mr. Sashi.

I also informed the Claimant that following the conclusion made by the CSP Committee, the Company will activate the domestic inquiry process. I further explained to the Claimant that the domestic inquiry process will start with the issuance of a notice of suspension to put the Claimant under suspension for 14 days. During these 14 days, notice to show cause will be issued and the domestic inquiry will be held. The Claimant was also informed that his salary will not be withheld during the suspension period. The suspension period will provide the Claimant proper time and opportunity to prepare for the domestic inquiry*.*

I further explained to the Claimant that for domestic inquiry, the burden of proof lies with the Company to show that the Claimant was indeed not performing. ***Therefore, it is not necessary that after the domestic inquiry, the Claimant will be found guilty. However, if the Claimant is found guilty, the punishment varies from warning, suspension to termination****.*

After hearing what I told him, the Claimant asked whether it is possible to go for mutual termination.

I was surprised that the Claimant had requested for mutual termination. *Nevertheless, I told the Claimant that at that point in time, I have no authority to offer any compensation package to the Claimant until I get approval from the Company.* ***What I was authorised to offer to the Claimant was the usual mutual termination offer which consists of the following:***

i. **One (1) month salary in lieu of notice; and**

ii. **Encashment of unutilised Annual Leave;**

The Claimant told us if the Company is paying him Annual Incentive Payment ("AIP"), he will accept the usual mutual termination offer. But if the Company is not paying him AIP, he would like to have 4-6 months' salary as ex gratia payment.

At that material time, none of us can be certain whether AIP will be paid. This is mainly due to an incident which occurred on 25 January 2019. One of the mining dams of our Company in Brazil collapsed and the incident would have a big impact on the finances of the Company. This is known to all employees of the Company including the Claimant.

I therefore told the Claimant that we cannot offer the AIP as no announcement has been made by the Company on whether AIP would be paid or not. However, if the Company decides to pay AIP, all employees who were in service during the material time would be entitled to receive the AIP. This is regardless of whether the employee has left the employment of the Company

subsequent to the entitlement period. In this case, the entitlement period is year 2018. This means that even if the Claimant were to go through domestic inquiry and is found guilty, he would still be entitled to the AIP if the Company decides to pay AIP. In other words, the payment of the AIP is an irrelevant consideration. The Claimant understood the circumstances.

It can be seen that for this reason, the AIP was not included in the mutual termination agreement signed by the Claimant. Nevertheless, the AIP was still paid to the Claimant subsequently when the Company has decided to pay AIP to all employees who were in service in year 2018.

I refer to the Mutual Separation Agreement at pages 43-50 of the Company's Bundle of Documents ("CBD") and Exhibit CL-9 of the Statement of Case.

***Be that as it may, I told the Claimant that I will raise the Claimant's request for 4-5 months ex gratia payment to the management but there is no guarantee that the management will agree*.**

***I also told the Claimant that he is to consider the usual mutual offer referred above and get back to us on his answer the next morning*.**

In fact, in order to allow the Claimant to have proper time to consider whether to accept the usual mutual termination terms, I informed the Claimant that he was to take the day off.

The Claimant agreed".

(Emphasis added)

[55] Prior to the said meeting on 28 January 2019, the Claimant was never informed that he was a poor performer or that he possessed a lackadaisical attitude.

[56] The Claimant was even paid the AIP for the years 2017 and 2018. COW-2 attempted to explain that the AIP was paid to all employees, regardless of whether they are good or bad performers, which is wholly contradictory to the provisions on AIP in the Vale Employment Handbook. Clause 5.5 of the Vale Employment Handbook (Revision No. 6) (*at p. 24 of Tab 4 COB-2*) provides:-

"*5.5 ANNUAL INCENTIVE PROGRAM 'AIP'*

The AIP quantum and payment shall be at the discretion of the Company and shall not constitute a legal entitlement. It shall be based on individual and Company's performance as well as benchmarked Key Performance Indicators*.*

Any AIP payments for the fiscal year in which the Employee's employment begins will be pro-rated based on the number of days he/she is employed with the Company during that fiscal year. All decisions of the Company in relation to an Employee's bonus shall be final and binding.

The AIP Payment formula and the Target will be as follows:

AIP Formula

AIP = AIP TARGET x DEPARTMENTAL RESULT x VALE RESULT x ANNUAL BASE SALARY"

(Emphasis added)

[57] The Vale Employment Handbook that would govern the Claimant's employment, i.e. Revision No. 5, was of course as stated above was never produced by the Company before this Court. Instead, the Company tendered the Vale Employment Handbook (Revision No. 4) (*exhibit CO-8*) wherein the clause pertaining to AIP Payments provides as follows:-

"*5.5 ANNUAL INCENTIVE PROGRAM 'AIP'*

The AIP quantum and payment shall be at the discretion of the Company and shall not constitute a legal entitlement. It shall be based on individual and Company's performance as well as benchmarked Key Performance Indicators*.*

Any AIP payments for the fiscal year in which the Employee's employment begins will be pro-rated based on the number of days he/she is employed with the Company during that fiscal year. All decisions of the Company in relation to an Employee's bonus shall be final and binding.

Please refer to Annual Incentive Plan rules specific for the current year".

[58] What is constant amongst these various versions of the Vale Employment Handbooks are that the AIP payments are always dependent on the individual's and

the Company's performance as well as benchmarked by Key Performance Indicators (KPI). The payment of the AIP is clearly at the discretion of the Company and based on performances and KPIs, thus COW-2's testimony that it is payable regardless of whether an employee is a good or bad performer cannot be accepted by this Court. Otherwise, it would not make sense to even have such a provision as Clause 5.5 (Revision No. 6) and Clause 5.4 (Revision No. 4) in the Vale Employment Handbook.

[59] COW-2's representation (and supported by COW-1) to the Claimant during the meeting on 28 January 2019 clearly affected the state of mind of the Claimant. COW-2's testimony that it was the Claimant who had suggested for a mutual separation agreement and that she was surprised that the Claimant even made such a suggestion is highly circumspect. Firstly, the Claimant did not even know of the alleged issue of his lackadaisical attitude. Secondly, from COW-2's statement in her witness statement (*COWS-2[C]; Q & A No. 4*), it is obvious that she was ready with the compensation offer despite being purportedly surprised with the Claimant's alleged suggestion for a mutual separation agreement.

[60] Both COW-1 and COW-2 did not deny the fact that they told the Claimant that he will be put under a domestic inquiry and he will have to prove at that platform that he was a performer in his role.

[61] The speed in which COW-2 and COW-1 acted in getting the Claimant to execute the Termination Agreement by the very next day is rather telling. The Court can only deduce that both COW-1 and COW-2 planned the meeting of 28 January

2019 to force the Claimant into signing the Termination Agreement. The Claimant was given 24 hours to decide by COW-2. The Claimant was told to be present at the meeting room at 3.30pm on 29 January 2019. This certainly does not show the Claimant to be one who is in complete control of his mental faculties if, as alleged, he was the one who suggested for a mutual separation agreement.

[62] The Claimant, together with his other two colleagues (i.e. CLW-1 and CLW-2), even went to the extent of driving down 80 miles to Ipoh to meet the Assistant Director of the Industrial Relations Department at 11.30am on 29 January 2019 to get her advice on what they ought to do. The Assistant Director of the Industrial Relations Department advised them not to submit any letter of resignation voluntarily and that even if they had to sign any document, they should sign it on a 'without prejudice' basis. Again, this does not show someone who had willingly proposed the route of a mutual separation agreement.

[63] When the Claimant and his colleagues reached the meeting room on 29 January 2019, COW-1, COW-2 and COW-3 were already there waiting with the Termination Agreements for them to execute. And all this was done by the Company in the space of 24 hours. The Claimant only had sight of the Termination Agreement at that very moment and he was not even given an opportunity to take the document back to vet through in order to make an informed decision. COW-1 admitted during cross-examination that the Termination Agreement was already prepared and ready before the Claimant even came into the meeting on 29 January 2019.

[64] COW-2 had even prevented the Claimant and his two colleagues from making any amendments or striking out any of the clauses contained in their respective Termination Agreements, as apparently it had been pre-prepared by the Company's solicitors. This does not show the very essence of a mutual separation agreement to exist, i.e. that there was a meeting of the minds ('*consensus ad idem*') between the parties before they put pen to paper. Rather, it was a unilateral imposition of terms by the Company on the Claimant, and that if the Claimant disagrees to any of the terms, then the spectre of a domestic inquiry awaits him.

[65] The Claimant, in line with the advice given by the Assistant Director of the Industrial Relations Department in Ipoh, signed the Termination Agreement on a 'without prejudice' basis. Counsel for the Company submits that it was only discovered later by the Company that the Claimant had placed the words 'without prejudice' next to his signature on the Termination Agreement. This is entirely incorrect. COW-2 was there with the Claimant when he signed the Termination Agreement and was fully aware of the same. COW-2 did not stop the Claimant from placing the said words on the Termination Agreement. In any event, the fact that the Claimant signed the Termination Agreement on a 'without prejudice' basis is the clearest indication that he objected to the said Agreement and had signed the same against his volition. Further, the Claimant raised a complaint in the matter that he had been removed from his employment by the Company to the Ombudsman the very next morning, i.e. 30 January 2019 at 11.52am (*exhibit CL-3 of the Statement of Case*).

[66] In the case of **Suseela Devi Balakrishnan v. INTI International College Kuala Lumpur Sdn. Bhd. [2019] 1 ILR 421; [2019] 3 MELR 224** it was held by the learned Industrial Court Chairman, P. Iruthayaraj D. Pappusamy:-

> "*The issue in this case is whether there was: (a) justification for the implementation of VSS by the company, and if so (b) whether the VSS was carried out voluntarily or involuntarily. If the VSS was carried out voluntarily then the claimant's separation from the company was proper and in order. If the VSS was applied involuntarily that is to say it was carried out by use of force subtle or otherwise or by coercion or duress in any form or by any unfair labour practice, then it may amount to dismissal without just or excuse*".

[67] And in the case of **Timber Master Trading (M) Sdn. Bhd. v. Jane Wang Sing Fang [1994] 2 ILR 1293; [1994] 1 MELR 693** it was held by the learned Industrial Court Chairman, Lim Heng Seng:-

> "*In the present case, the Court is not dealing with a case founded upon constructive dismissal or "forced resignation". The Claimant alleges that she had been dismissed. The Company on the other hand contends that there had been a mutual termination of the contract of employment. The Court has found that there was an understanding between the Claimant and the Company that the relationship of employer-employee existing between them is to come to an end. The issue before the Court is whether the contending parties had indeed*

come to mutual agreement to terminate the Claimant's contract of employment which the Court should give effect to.

It is the Court's considered opinion that the correct approach in dealing with the case of an alleged mutual termination of a contract of service should be the same as the approach adopted by the Court in dealing with the analogous case of a "forced resignation" by an employee.

The duty of the Court is to determine whether there had been a termination which had been mutually and freely agreed upon between the parties. The Court cannot in equity and good conscience give effect to a purported mutual agreement which had not been genuinely consensual. It cannot be seriously argued that there was a mutual termination where there is no genuine consensus between the parties; and in particular where the employee's volitional capacity had been impaired at the time he was purported to have agreed to the mutual termination.

However, where the employee does not plead harassment, compulsion, undue advantage, oppression, unfair labour practice or any other matter which the Court would in equity and good conscience consider to be vitiating circumstances in the process of arriving at, and/or in the substance of the agreement. The Court would be slow to go behind the same. An agreement mutually and freely arrived at between the parties to dissolve the relationship of an employee and his employer must be given effect to".

(Emphasis added)

[68] The importance of general consensus or a meeting of the minds ('*consensus ad idem*') in mutual separation agreements was stressed by the learned Industrial Court Chairman, Rajendran Nayagam, in the case of **Jamil Arshad & Ors v. CNA Manufacturing Sdn. Bhd. [2010] 8 MELR 409; [2010] 2 LNS 1305**:-

> "*When an employer is facing declining business, he may be forced to make a substantial reduction in his workforce, this he may do either by way of retrenchment or through the introduction of a voluntary separation scheme. Unlike in the case of retrenchment, in the case of voluntary separation scheme, the employer issues a circular inviting its employees to take advantage of an early retirement scheme. Under the scheme, the employer normally offers an attractive retirement package, which is better than the statutory minimum for retrenchment. When an employee makes an application, he is said to make an offer of early retirement to the company, which is subject to the acceptance by the company.* ***When the company accepts the application of the employee, the contract of employment is said to be terminated by mutual consent and it is not considered as a dismissal****, (see* Birch & Another v. Liverpool University [1985] I CR 470*).*
>
> ***What is important to note in this type of scheme calling on the employees to apply for early retirement is that by its very nature, it is done on a voluntary basis, without the employee being forced into retirement. The court cannot in equity and good conscience give effect to a purported mutual agreement which is not genuinely consensual, in particular where the employee's volitional capacity had been impaired at the time he was***

purported to have agreed to the mutual termination*. On the other hand, an agreement mutually and freely arrived at between the parties must be given effect to.* (see Timber Master Trading Sdn Bhd v. Jane Wang [1994] 1 MELR 693; [1994] 2 ILR 1293 (Award 553 of 1994)).

The onus is on the employee to establish by cogent evidence that he was forced into signing the mutual separation agreement".

(Emphasis added)

[69] Counsel for the Claimant referred to this Court's decision in **Murali Tharan Nair G Narayana Nair v. HLMG Management Co Sdn Bhd [2020] 2 MELR 316; [2020] 2 LNS 0276** where it was held:-

"*Since the MSA is an agreement that brings an end to the Claimant's employment, the relevant provisions of the Contracts Act 1950 would be applicable.*

Section 10 of the Contracts Act *provides:-*

"What agreements are contracts

10(1) All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void"

Section 13 of the Contracts Act 1950 provides:-

"Consent

13(1) Two or more persons are said to consent when they agree upon the same thing in the same sense"

Section 14 of the Contracts Act 1950 provides:-

"Free consent

14. Consent is said to be free when it is not caused by-

(a) coercion, as defined in section 15;

(b) undue influence, as defined in section 16;

(c) fraud, as defined in section 17;

(d) misrepresentation, as defined in section 18; or

(e) mistake, subject to sections 21, 22 and 23.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake".

Thus, ***the principles applicable to a termination of an employment contract via mutual separation scheme are:-***

i. ***there must be a genuine consensus or*** **consensus ad idem** ***(a meeting of the minds) between the parties when entering into the mutual separation agreement; and***

ii. ***there must be no harassment, compulsion, undue advantage, oppression, unfair labour practice, misrepresentation, duress, coercion or any other matter, which the Court may consider to be vitiating factors in the process of reaching the said agreement***."

(Emphasis added)

[70] In the case at hand, it cannot be said by any stretch of imagination that there had been a meeting of the minds (*consensus ad idem*) between the Claimant and the Company. The Claimant was evidently put in fear of an impending disciplinary action *via* the holding of a domestic inquiry.

[71] Counsel for the Company submits that there had been no threat of a dismissal as the domestic inquiry had not even been held at that point in time. With due respect, the Court is unable to agree with submission of the Company's Counsel. COW-2's representation alone that a domestic inquiry will be held was cause for concern already that the eventuality of a termination, amongst other forms of punishment, was a possibility and that in itself had affected the Claimant's state of mind that he would be left with nothing if he did not execute the Termination Agreement. Company's Counsel's submission that the Claimant merely executed the Termination Agreement for the compensation is widely off the mark. Even the Company's own witness, i.e. COW-3, admitted during cross-examination that the Claimant did not sign a voluntary resignation.

[72] Counsel for the Company relied heavily on the Industrial Court case of **Harpers Trading (M) Sdn. Bhd., Butterworth v. Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan [*supra*]** which states that there must be a direct threat of termination – "*resign or be sacked*" – before it can be said that there had been a dismissal. However, the facts in the **Harpers Trading** case differs in that there the employees concerned were involved in theft of the Company's goods and thus had resigned voluntarily in order to avoid police investigations. In the case at hand, the Claimant did not even know what was his fault or shortcoming before COW-2 and COW-1 went about informing him that a domestic inquiry will be held and what the possible consequences would be. The element of voluntariness is wholly devoid in the case at hand.

[73] The Court is certainly guided by the decision of Aziah Ali J. (as Her Ladyship then was) in the High Court case of **Phileo Allied Bank (M) Bhd v. Tan Mon Nee & Anor [2010] 18 MLRH 1; [2010] 1 LNS 813**:-

> "*I do not find the findings of the Industrial Court unsupported by evidence. The Industrial Court evaluated the evidence produced by the Applicant and the 1st Respondent, particularly with the regard to the events that occurred on 20.12.1999, and concluded that the 1st Respondent did not resign voluntarily. The evidence shows that the 1st Respondent attended the meeting on 20.12.1999 as she was asked to do so by the Branch Manager and she had no idea what the meeting was about. She went to the meeting and found herself facing three senior officers. There is no evidence to suggest that the 1st Respondent intended to resign on 20.12.1999. The issue of resignation came up*

during this meeting. By the time the meeting ended two hours later the 1st Respondent had tendered her resignation. The question that arises is what occurred during the meeting that resulted in the 1st Respondent tendering her resignation? The Industrial Court accepted the evidence of the 1st Respondent that after hearing what COW-1 told her, she was frightened, confused and her mind completely switched off. Having perused the evidence, I am of the view that there is sufficient evidence to support the Industrial Court's conclusion that the 1st Respondent was put under compulsion to resign on the threat of disciplinary action and dismissal. That threat is evidenced by the letter of suspension that was already prepared and which COW-1 said she had intended to serve on the 1st Respondent on 20.12.1999. Had the 1st Respondent not resigned, there was every probability that COW-1 would have served the suspension letter and disciplinary action and dismissal would have followed suit. Considering that before the 1st Respondent attended the meeting on 20.12.1999 there is no evidence that she had wanted to resign on that day, the fact that the 1stRespondent wrote her resignation letter within two hours of meeting the three senior officers indicates that she was not given sufficient time to think over the matter. The 1st Respondent may not have been physically restrained from leaving the meeting, but it is apparent from the evidence that she was not free to leave the room without first making a decision whether to resign or face disciplinary action and eventual dismissal. The meeting ended with the 1st Respondent writing her resignation letter. Counsel for the Applicant submits that the 1st Respondent had received a better offer and therefore it was in her interest to resign. It is submitted that

the 1st Respondent had joined JB Securities immediately after her resignation. I am unable to agree with counsel. ***There is evidence that she did receive job offers but there is no evidence that she had a firm offer from JB Securities when she tendered her resignation on 20.12.1999. Although she did join JB Securities, it was not immediately upon her resignation as contended by counsel for the Applicant.*** *I find that the evidence supports the finding of the Industrial Court that at the time of her resignation, the 1st Respondent has not secured any job offer.*

A resignation obtained under compulsion is no resignation in law. In Stanley Ng Peng Han v. AAF Pte Ltd [1978] 1 LNS 186; [1979] 1 MLJ 57 *the court said:-*

> *It will be dear that the underlying basis of the doctrine of "forced resignation" is the existence of facts showing an employee was put under compulsion to resign and that if he declined to do so, the employer would proceed to dismiss him in any event.*

Counsel for the Applicant submits that the Industrial Court has failed to consider that the 1st Respondent was not told to resign. The Industrial Court disagrees with the Applicant's contention that the 1st Respondent must prove that one of the officers told her "either you resign or be sacked". ***The Industrial Court opined that although it was not exactly said to the 1st Respondent that she must resign or be sacked, there was an element of persuasion which put the 1st Respondent under compulsion to resign. To my mind whether***

or not the 1st Respondent was 'told' to resign depends on the facts. <u>There are no specific words or terms that an employer is required to use or utter to communicate to his employee the message that the employee ought to resign or otherwise dire consequences in the form of disciplinary action and dismissal will follow. So long as from his words and/or conduct the employer makes it known to the employee in unmistakable terms that resignation is a better option to disciplinary action and dismissal, and acting on that basis the employee was induced to resign, to my mind that is sufficient to amount to 'telling' the employee to resign</u>".

(Emphasis added)

[74] The Claimant did not even have another job waiting for him in the event he resigned from the Company. He had a family to take care. It does not make any sense for someone to walk into that meeting room on 28 January 2019 and say in one breath that he wants to enter into a mutual separation agreement immediately after COW-2 and COW-1 informs him that the Company does not like his attitude.

[75] Upon analysing the evidence in its entirety, the Court finds that the Termination Agreement had not been voluntarily entered into by the Claimant. He had been clearly forced by the Company to resign from his employment. The Claimant has succeeded in proving, on a balance of probabilities, that he had been dismissed by the Company in the guise of a mutual separation scheme.

(ii) Whether the dismissal was with or without just cause or excuse

[76] It is trite law that the sanctity of a contract should always be upheld. However, there are vitiating factors that could upend that sanctity if it could be proved that the contract was not entered into in a free state of mind or genuine consensus.

[77] The manner in which COW-1, COW-2, and to a certain extent COW-3, conducted themselves in informing the Claimant that the CSP Committee had issues with the Claimant's attitude and that a domestic inquiry will be held, and at the drop of a hat, brandishes out the Termination Agreement, all within the space of 24 hours, clearly shows that the Termination Agreement was clearly not entered into voluntarily by the Claimant.

[78] The Claimant was put into fear that a domestic inquiry will be held and a termination would necessarily ensue. No doubt the domestic inquiry panel may impose other forms of punishment, but the threat of holding one already worked into the Claimant's mind that a termination was a looming probability.

[79] The Company's contention that the Claimant had displayed unsatisfactory performance or attitude was not proven by any contemporaneous documents. The Company merely produced the CSP Committee meeting minutes which was undated, unsigned and clearly lacked details and clarity.

[80] Counsel for the Company submits that the issue of poor performance and attitude of the Claimant is irrelevant to the matter at hand as the Court only has to look at the voluntariness in the execution of the Termination Agreement. But it cannot be denied that these issues of poor performance and attitude were the very factors that the Company employed in issuing the threat of holding a domestic inquiry against the Claimant and induced the Claimant into executing the Termination Agreement.

[81] Under the circumstances, the Court finds that the Termination Agreement dated 29 January 2019 was not entered into by the Claimant on his own free volition. The Claimant had indeed been dismissed by the Company and such a dismissal was made without just cause and excuse.

VI. The Remedy

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

[83] Further, COW-3 had testified during examination-in-chief that the Claimant's position is no longer vacant and thus to return the Claimant into the Company's employment might cause other employees to be bumped off from their respective positions just to accommodate the Claimant. And in view of the current economic climate and unemployment rate due to the COVID-19 pandemic, a reshuffling of positions or jobs would invariably entail a greater harm than good.

[84] The Federal Court in **Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304** held that the Industrial Court is authorised to award monetary compensation if it is of the view that reinstatement is inappropriate.

[85] The Claimant had pleaded in his Statement of Case that his last drawn salary was RM9,093.00 per month besides a fixed monthly transport allowance of RM300.00, a fixed Minimum Shift Allowance of RM250.00 per month and a fixed Holiday Allowance of RM396.00 per month. However, the Court is not inclined to allow the said fixed allowances as it would only become payable if the Claimant had worked. Since the Claimant was out of work after 31 January 2019, the said allowances cannot be justified as being part of his backwages. Any claims for allowance for work-related purposes becomes a non-issue.

[86] The Company also implemented a contractual 13th month salary (subject to statutory deductions) for all its employees effective 28 February 2018.

[87] The Claimant is entitled to compensation *in lieu* of reinstatement, at the rate of one month's salary for each year of service. The Claimant commenced his employment on 3 April 2017 and was dismissed on 31 January 2019. He had been in employment for 1 year and 10 months at the time of his termination. Thus, the Claimant's completed years of service is 1 year. The Claimant is entitled to compensation *in lieu* of reinstatement for a total sum of RM9,093.00.00.

[88] Para. 1 of the Second Schedule of the Industrial Relations Act 1967 provides that in the event that back wages are to be given, such back wages shall not exceed 24 months' back wages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse. The Claimant was terminated on 31 January 2019 and the hearing of this case was completed on 7 October 2020. Thus, the Court allows a total of 22 months back wages, amounting to RM200,046.00, i.e. RM9,093.00 x 22 months.

[89] The Claimant testified during trial that after he was terminated by the Company, he had remained unemployed. Under the circumstances, the Court exercises its discretion to impose a deduction of 5% to be made on the back wages awarded to the Claimant.

[90] The Claimant was paid a sum of RM21,683.31 consisting of 1 month's salary (RM9,093.00) as *ex gratia* payment, 1 month salary (RM9,093.00) *in lieu* of termination notice and unutilised leave (RM3,497.31) pursuant to the Termination Agreement dated 29 January 2019. Therefore, a sum of RM18,186.00 (being the 1 month salary *ex gratia* payment and 1 month salary *in lieu* of termination notice) shall be deducted from the backwages awarded herein.

VII. Award

[91] The Court awards and directs that the Company pay to the Claimant a total sum of **RM170,948.40**, which is derived from the following calculation:-

(i)	Compensation *in lieu* of reinstatement	
	RM9,093.00 x 1 month	…RM 9,093.00
(ii)	Back wages	
	RM9,093.00 x 22 months	…RM 200,046.00
(iii)	Less deduction of 10%	…RM (20,004.60)
(iv)	Less payments under the Termination	
	Agreement	…RM (18,186.00)
	Total	**… RM 170,948.40**

[92] The Company shall pay the said award sum of RM170,948.40, less statutory deductions (including but not limited to EPF and SOCSO contributions) to the Claimant's solicitors, Messrs. Prem & Chandra, within 60 days from the date mentioned at the bottom of this Award.

HANDED DOWN AND DATED THIS 9TH DAY OF NOVEMBER 2020.

-Signed-

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