

INDUSTRIAL COURT OF MALAYSIA

CASE NO: 24(13)/4-807/18

BETWEEN

LIM PHOOI MAN

AND

SAMSUNG MALAYSIA ELECTRONICS (SME) SDN. BHD.

AWARD NO: 1134 OF 2019

BEFORE : **Y.A. TUAN P. IRUTHAYARAJ D. PAPPUSAMY
CHAIRMAN**

VENUE : Industrial Court Malaysia, Kuala Lumpur.

DATE OF REFERENCE : 27.03.2018.

DATES OF MENTION : 15.05.2018, 02.08.2018, 22.10.2018, 14.11.2018.

DATES OF HEARING : 26.11.2018, 18.02.2019, 19.02.2019.

REPRESENTATION : Mr. Ramdhari JBS from Messrs P. Kuppusamy &
Co., Counsel for the Claimant.

Mr. Anand Ponnudurai together with Ms. Ponnie
Govindasamy from Messrs Bodipalar Ponnudurai
De Silva, Counsel for the Company.

REFERENCE:

This is a reference made under subsection 20(3) of the Industrial Relations Act 1967 dated 27.03.2018 arising out of the dismissal of **Lim Phooi Man** (hereinafter referred to as "the Claimant") by **Samsung Malaysia Electronics (SME) Sdn. Bhd.** (hereinafter referred to as "the Company") on 11.09.2017.

AWARD

Background Facts

1. Pursuant to a Job Advertisement placed by Agensi Pekerjaan Career Telstar Sdn. Bhd. (JTK 1688) (Search/Recruitment) as shown in CLB-3 which was posted for the Company, the Claimant had applied for the position of Personal Assistant, KL. As per the said Job Advertisement, the first requirement to be made for the said position was that the “**Candidate must possess at least a Professional Certificate in Secretarial Courses, Business Administration or related discipline**”.

2. The Claimant in applying for the said position had provided her CV/Resume profile whereby she expressly stated that “**she possessed a Diploma in Social Sciences and a Diploma in Executive Secretaryship**”. Besides this she also duly filled in the Company’s Job Application form where under the heading EDUCATIONAL QUALIFICATION she expressly stated ‘DIPLOMA IN SECRETARY’ from Olympia Business School, KL completed in the year 1999.

3. Subsequent to that, the Claimant was called in for an interview with Mr. Jaisul Yu (the previous Managing Director of the Company) and vide a Letter of Offer dated 18.01.2010, commenced her employment with the Company as its Senior Staff, HR & GA as PA to MD (classified as S3-II) with effect from 28.01.2010 which was agreed and accepted by the Claimant.

4. The Claimant was later confirmed in her position effective from 24.05.2010 vide the Company's letter dated 24.05.2010.

5. Thereafter, the Claimant was promoted to the position of Assistant Manager at S4-I level as of 01.03.2013 and subsequently received a job band promotion from S4-I to S4-II level effective 01.03.2015. In this regard, the Company states that the Claimant remained as an Assistant Manager at the material time.

6. At all material times, the Company had in place specific guidelines on employees' conduct (Pages 6 to 10 of COB) applicable to all employees including the Claimant herself whereby the Claimant had signed and accepted the Company's Code of Ethics on 25.01.2010. The Code of Ethics, inter alia, expressly states that:

"CRIMINAL ACTIVITIES/FRAUD

The Company will not permit any illegal or criminal activity to take place and will not, with due knowledge, directly or indirectly, support any such activity.

The Company will not tolerate employees who allow themselves to be involved in fraudulent activities. The following are some examples of fraud:

- *Misappropriation of funds, or any other assets;*
- *Any irregularity in the handling or reporting of money transactions;*
- *Forgery or alteration of cheques, drafts & securities;*
- *Manipulation, falsification or alteration of records or documents;*
- *Suppression or omission of material effects of transactions from records, documents and etc.*

It is the responsibility of each employee to immediately notify his immediate superior or the Internal Audit Department upon his noting any irregularity or suspicion of an irregularity. In case of fraud by any employee, the Company will take severe measures which may not only consist in the dismissal of the employee, but also in the filing of a police report.”

7. On 06.07.2017, the Company had sent an email at page 13 of COB to its employees informing that the Company's HR Department will be conducting an educational verification for all its permanent employees whereby the employees were required to provide their consent by signing on the name list which was to be circulated by the Company. Vide the same email, the employees were also informed that they will be required to provide a copy of their education certificates to the Company in the event the Company's HR was unable to retrieve the same from their personal files.

8. In this regard, the Company stated that its HR Department had discovered that it was unable to retrieve the Claimant's latest education certificate from her personal file. As such, the Company had requested her to provide a copy of her latest education certificate to the Company.

9. The Company's HR Department had on 13.07.2017, appointed a 3rd party research company namely Venovox to assist in seeking verification on the employees' academic qualification. The employees including the Claimant had signed the consent letter authorizing Venovox to carry out its task on the same day.

10. In addition, the Company states that the Claimant had signed the Educational Declaration Form on 27.07.2017 which appears at page 14 of COB. A perusal of the

same will show that the Claimant had made a declaration to the Company stating that she had a Diploma in Executive Secretaryship issued by Olympia Business School commencing from 1998 and ending at 1999 and provided her transcript of completion for Semester 1 to support her declaration. The said declaration expressly states that any wilful suppression of any materials or facts will be sufficient ground for termination.

11. However, during the audit investigation, the Company had difficulty to verify the Claimant's qualification on her Diploma in Executive Secretaryship as they needed a completed certificate and not just the transcript for Semester 1 and the same was requested to the Claimant vide the series of emails found in pages 40 to 48 of CLB-2. However, the Claimant had only blatantly replied that she has given everything that was requested from her.

12. Thereafter on 01.08.2017, the audit investigation on the Company was conducted wherein the results of the same had revealed that the Claimant did not possess proper academic qualification namely the Diploma in Executive Secretaryship from Olympia Business School as stated in her application form and/or CV.

13. Due to the gravity and seriousness of the Claimant's conduct, the Company had issued a show cause letter dated 14.08.2017 found at pages 15 to 16 of COB requiring the Claimant to explain in writing as to why an appropriate disciplinary action should not be taken against her. In particular, the Claimant was asked to explain the following:

- “(i) That you do not have a proper academic qualification, namely the Diploma in Executive Secretaryship in Olympia Business School as stated by you in the application form and/or your CV;*
- (ii) The you have made false representations of your qualifications to secure your employment with the Company;*
- (iii) That you have misrepresented your qualification and/or committed act of dishonesty/deception in order to secure your employment with the Company.”*

14. The Claimant had in a letter dated 17.08.2017, replied to the Company’s show cause letter dated 14.08.2017. A perusal of the said letter of reply will show that the Claimant had clearly admitted that she did not possess the Diploma in Executive Secretaryship but only the result transcript for one semester.

15. In reply thereto, the Company had issued the Claimant a letter dated 28.08.2017 informing her that the Company’s records clearly showed that the Claimant did not have a Diploma in Executive Secretaryship and requested her to provide evidence or documentations to confirm her allegation in her reply letter by 30.08.2017.

16. Thereafter, the Claimant had issued a letter dated 30.08.2017 to the Company reiterating the contents in her reply letter dated 17.08.2017. In the said letter the Claimant admitted that she does not possess Diploma in Executive Secretaryship.

17. In view of the seriousness of the Claimant’s misconduct and her admittance to the same, the Company had decided to terminate the Claimant’s services with

immediate effect from 12.09.2017 vide a letter dated 11.09.2017 which appears at page 25 of COB.

18. Vide letter dated 18.09.2017 which appears at pages 26 to 27 of COB, the Claimant had alleged that the Company had waived and/or condoned and/or acquiescence to the requirement of Diploma in Executive Secretaryship and urged the Company to withdraw all accusation levelled against her.

19. In reply thereto, the Company had vide its letter dated 20.09.2017 which appears at page 28 of COB denied the Claimant's allegations and informed the Claimant that the Company stood by its decision on her dismissal.

The Issue

20. The issue to be determined by this Court is twofold:

- (a) Whether the misconduct complained of by the employer has been established; and
- (b) If so whether the proven misconduct constitutes just cause or excuse for the dismissal.

Evaluation of Evidence and Finding

21. In respect of Issue (a) as to whether the misconduct complained of by the employer has been established the following matters need to be dealt with:

- (i) **Did the Claimant provide the Company with falsified information by having dishonestly misrepresented her qualifications in her CV and Job Application form where she had stated that she has a Diploma in Executive Secretaryship from Olympia Business School when in fact she did not have such a Qualification?**

22. The pertinent reason stated in the Claimant's dismissal letter dated 11.09.2017 is as follows:

"It is apparent that you have provided the Company with falsified information in your curriculum vitae (CV)/resume and/or job application form with regard to your qualification. You were employed based on the qualification as provided by you and/or as stated in your CV/resume.

You have stated that you obtained a Diploma in Executive Secretaryship from Olympia Business School. However, it now transpired that you have never obtained a Diploma in Executive Secretaryship from Olympia Business School.

The Company does not tolerate or condone such conduct of yours as it goes against the core value, principle and/or established rules and regulations of the Company. Further, your actions have also breached the doctrine of mutual trust and confidence."

23. Furthermore, the allegations contained in the Company's show cause letter dated 14.08.2017 to the Claimant requiring her to explain in writing as to why an appropriate disciplinary action should not be taken against her had also made specific reference to the following:

- (i) That she did not have a proper academic qualification, the Diploma in Executive Secretaryship in Olympia Business School as stated by her in her CV and /or in the application form;
- (ii) That she had made false representations of her qualifications to secure her employment with the Company; and
- (iii) That she had misrepresented her qualification and/or committed act of dishonesty/deception in order to secure her employment with the Company.

24. It is an established principle of law that misrepresenting one's qualification in a CV and an application form is a serious misconduct which warrants a dismissal. In the case of **Khoo Kim Loang v. Shock Media Studio Sdn. Bhd.** (Award No. 51 of 2018) the Learned Chairman had taken great effort to define "resume fraud" whereby *inter alia* it was stated as follows:

"[18] The Wikipedia defines "Resume fraud" or "Application Fraud" as any act that

"involves intentionally providing fictitious, exaggerated, or otherwise misleading information on a job application or resume in hopes of persuading a potential employer to hire an applicant for a job for which they may be unqualified or less qualified than other applicants. Depending on the nature of the offence, the type of a job, and the jurisdiction where it occurs, such an act may or may not be a violation of criminal law. In any case, knowingly providing inaccurate information to an employer or potential employer, if discovered by the employer, is almost always grounds for immediate dismissal from the job or else denial of that job."

25. Applying the above-mentioned principle of law to the facts of the instant case, it is an undisputed fact that at the time of the interview or appointment, **the Claimant had not possessed a Diploma in Executive Secretaryship from Olympia Business School.** By stating in her CV and Job Application form that she possessed this qualification, she had obviously made a false representation. In fact, the Claimant in her own testimony had admitted that she does not possess the said qualification and at all times was fully aware of the same:

“Cross-examination of CLW

Q16: At page 35 of COB, can you confirm that you have represented to the Company that you possess these two Diplomas?

A16: Agree.

...

Q26: Referring to allegation 1. There is no dispute that you do not have that proper academic qualification namely the Diploma in Executive Secretaryship. Are we on common ground?

A26: Correct.

Q27: Let’s look at page 20, your reply to the Show Cause Letter. I put it to you that you were at all times fully aware that you do not have the proper academic qualification i.e. the Diploma in Executive Secretaryship.

A27: Yes.”

26. The Court's view is that the commission of misrepresentation in one's CV/Resume in order to obtain employment is a misconduct justifying immediate dismissal and this was pursuant to the case of **Khoo Kim Loang v. Kim Siah Electric Co Sdn. Bhd.** (Award No. 137 of 2018) where the Court held as follows:

“At para 276 at p. 798 in his book “Employee’s Misconduct as Cause for Discipline and Dismissal in India and the Commonwealth”, author Alfred Avin has stated as follows:

By way of contrast, the cases are unanimous that obtaining employment by lying to get the job is industrial misconduct.... It has been held that an applicant who lies about his age is guilty of employment misconduct. Similarly, an employee may be dismissed because, when applying for the job, he falsely stated that he had passed a qualifying examination, or had never been arrested, or had never worked for the Company before, when in fact he had previously been employed and dismissed, or had never worked at all before when in fact he had previously been dismissed for theft, or had not been dismissed from a prior job...

The other learned authors BR Ghaiye and Harvinder Singh in the book Law of Simple Discharge [in Private and Public Stores] have said at p. 481:

Services can be terminated for misrepresentation in getting employment... An employee may give wrong particulars at the time of appointment in order to hide his incompetence or bettering his chances of employment. In all such cases the contract secured by misrepresentation become invalid...

And at p. 482:

A workman may misrepresent facts to the employer in order to get employment. If he does so then he is guilty of dishonesty and cheating both.”

27. Based on the above analysis, I have no hesitation in making a finding that the Claimant had dishonestly misrepresented to the Company that she did possess the Diploma in Executive Secretaryship as stated by her in both her CV and Job Application form when in fact she did not possess such a qualification.

(ii) **Is the Claimant capable of knowing or that she knew that she does not possess the Diploma in Executive Secretaryship at the time she wrote and submitted her CV and filled in the Application Form for the said post?**

28. In my view having perused and analysed the CV which the Claimant had written for the said post, I have no hesitation in believing that she has a good command of the English language and she is obviously capable of knowing what she had written in her CV and knew what is meant by the words “I possessed a Diploma in Executive Secretaryship”. **Literally it simply means that she has completed and owns a Diploma. It is as simple as that.** There is nothing ambiguous about that fact.

29. Therefore, knowing that she did not possess a Diploma in Executive Secretaryship and yet stating that she possessed it certainly amounts to a misconduct of falsely misrepresenting her qualification in order to obtain the Job. Thereby, the Claimant had willingly intended to deceive the Company. In this regard, it is relevant to refer to the case of **Royal Sungei Ujong Club v. Vijaysankar Arumugam** (Award

No. 1272 of 2009) (2010) ILR 35 whereby in deciding the Claimant's dismissal for misrepresenting his qualifications in his application letter and his resume, the Court held as follows:

"Misrepresentation is a misconduct whereby the elements of dishonesty and deception are involved. A misrepresentation is a statement, which conveys a false or wrong impression. Here, the Claimant had known that he had not possessed the qualifications. Yet he had knowingly stated in his application and his resume that he had possessed an MBA. The claimant by his conduct had shown his intention to deceive the Club."

30. Applying the principals as stated in the above mentioned case, there is no doubt that the Claimant knew that she did not possess the said Diploma when she submitted her CV and the completed Job Application form. Therefore, she had obviously dishonestly misrepresented her qualification.

(iii) **Is there any merit in the Claimant's defence that the company was aware that she does not possess the Diploma in Secretaryship but only the transcript?**

31. The Claimant in her replies to the Show Cause Letters and during the hearing placed enormous emphasis upon her contention that Mr. Jaisal (former Managing Director) and Mr. KK Cheah who was the Human Resource Manager at that material time were duly informed during the interview process that she did not possess the qualification of Diploma in Executive Secretaryship but only has the transcript. In her replies to the Show Cause Letter she stated:

“I have informed them that I do not have a certificate for the Diploma in Executive Secretaryship, but the transcript.”

32. As such she claimed that in the circumstances of the case there was no misrepresentation as alleged as she had furnished her transcript for Semester 1 to Mr. Jaisal and Mr. KK Cheah. If this was her contention from the very inception then logically, she ought to have stated exactly that in her CV in that she only has a transcript but not the Diploma in Executive Secretaryship. In my view by her merely stating that she possessed a Diploma in Executive Secretaryship in her CV and nothing more (i.e. without any further qualification) would certainly give a false representation to the Company that she has a full Diploma and not just a transcript for Semester 1 as she had stated. In any event by no stretch of imagination can a mere transcript of Semester 1 results be interpreted as having possessed a Diploma in the true sense of the word. I am of the considered view that the Claimant's assertion that she had duly informed of her qualification to Mr. KK Cheah and Mr. Jaisul Yu without any further tangible probative evidence that she did not possess a Diploma is merely a bare and false assertion. I say this for the following reasons:

- a) It is striking to note that the Claimant did not produce any corroborative evidence that Mr. KK Cheah was informed that she did not possess the qualification of the said Diploma i.e. the Claimant's file did not contain any note by Mr. KK Cheah nor Mr. Jaisul Yu to that effect;
- b) Based on her reply to her show cause letter, it would be reasonable to conclude that probably the only fact that was informed to Mr. KK Cheah and Mr. Jaisul Yu is that she has not received the official certificate but

has in her possession only a transcript of Semester 1 results. This she failed to do;

- c) It was adduced in evidence that even in 2017 the Claimant had not obtained her Diploma in Executive Secretaryship. If she had informed Mr. Jaisul Yu and Mr. KK Cheah during the interview process that she did not possess the said Diploma as alleged, there was no necessity for her to declare again in 2017 vide the Education Declaration form that she possessed the said Diploma. The evidence seemed to point to the fact that the Company remained unaware that she did not possess a Diploma in Executive Secretaryship. In this regard, it is relevant to refer to the case of **Royal Sungei Ujong Club v. Vijayasankar Arumugam** (Award No. 1272 of 2009) whereby the Court in finding whether the Claimant in that case had informed the Company of his qualification had considered the evidence of his declaration which was made later whereby the Court held that the fact that he made a declaration in the later stage knowing he has not possessed the MBA reflects the evidence that the Company is still unaware of his qualification;
- d) Similarly, when the Company was having difficulty verifying her qualification on Diploma of Executive Secretaryship, the Company had approached the Claimant to request her to provide her completion certificate to ease the verification. If indeed the Claimant had disclosed her qualification to Mr. Jaisul Yu and Mr. KK Cheah, she would have immediately informed the Company at this point of time as well that she does not have the said qualification and that the Company was aware of

this. However, a perusal of the series of emails which appears from pages 40 to 48 of CLB-2, clearly reveals that the Claimant did not do so and clearly avoided providing the completed Diploma.

33. Based on the above analysis, it is the Court's view that the Claimant by merely asserting that she had informed the Company that she did possess the Diploma without showing any corroborative evidence to that effect is certainly not a proper defence at all.

(iv) **Does the Claimant's extensive reliance on Mr. Jasul's emails dated 30.08.2017 and 31.08.2017 respectively has merits in her claim that the Company was therefore in the know that she did not possess a Diploma from the time she was employed and as such, there was no misrepresentation of her qualification on her part?**

34. With regard to Mr. Jaisul's email dated 30.08.2017 which is found at page 63 of CLB-2 which was addressed to her confirms that he believes that he was informed that there is no Diploma and it is non-gradable course as it is an evening class after work.

35. With regard to the said email dated 30.08.2017 it is the Court's view that Mr. Jaisul was merely supporting the Claimant and therefore his email should not be given due weight for the following reasons:

- a) A perusal of the said email trails at pages 63 to 64 of CLB-2 will clearly reveal that the Claimant has been communicating with Mr. Jaisul Yu as

regards her show cause letter and her reply dated 17.08.2017 prior to his email;

- b) Mr. Jaisul Yu's said email dated 30.08.2017 was sent upon the Claimant's request to "support her" after she was required to provide evidence that she had informed Mr. Jaisul Yu of her qualification through a phone call and an email dated 28.08.2017 which appears at page 63 of CLB-2 whereby the Claimant had requested as follows:

"I would like Mr. Yu to support me by an write in that Mr. Yu was informed by me, that I do not have a Diploma in Executive Secretaryship, and the course if 'non-gradable', (sorry for my typo error in my show cause reply) hence I placed a 'pass' as my final score column in Samsung application form."

- c) In this regard it is pertinent to narrate the Claimant's own testimony where she herself had admitted that her email dated 28.08.2017 in essence contains what she required of Mr. Jaisul Yu whereby the following were her answers:

"Cross-examination of CLW"

Q40: *This was the email (email dated 28.08.2017) you sent to Mr. Jaisul after your phone call to him?*

A40: *Yes.*

Q41: *As per your email, you wanted him to support you. Correct?*

A41: *Correct.*

Q42: *Would you agree that in this email you have also in essence told him (Mr. Jaisul Yu) what you require of him in an email?*

A42: *Correct."*

- d) In the Court's view a perusal of Mr. Jaisul Yu's email dated 30.08.2017 will clearly reveal that his email was tailored in accordance to what was required of him whereby it can be clearly seen that he had reiterated what the Claimant had told him in her email dated 28.08.2017. It must be noted that at this point of time, Mr. Jaisul Yu had left the Company long ago and therefore the contents of the email are questionable and should not be given due weight at all.

36. With regard to Mr. Jaisul Yu's email dated 31.08.2017 which is found at page 66 of CLB-2 addressed to Mr. Calvin (COW) stating that the Claimant was not hired because of her Diploma but she was chosen as she was capable based upon his assessment through her interview with him. As regards Mr. Jaisul Yu's email dated 31.08.2017 which states that the Claimant was not employed based on her qualification, the Court has taken note of the following factors:

- a) A perusal of the Job Vacancy advertisement at CLB-3 clearly states one of the main requirements for the said Job was that the Candidate must possess at least a Professional Certificate in Secretarial Courses or related discipline;

- b) Pursuant to that requirement, the Claimant was called in for an interview based on her resume and job application form which reflected that she has the necessary qualification that the Company HR was looking for;
- c) Though Mr. Jaisul Yu was the one who had interviewed her and chosen her for the job, hiring her was still under the jurisdiction of the Company's Human Resource Department. At this stage I must state that checking as to whether the Claimant possessed the said Diploma as claimed by her is the function of the HR Department and not that of Mr Jaisul Yu;
- d) For Jaisul Yu to conclude that she had not been hired because of her Diploma but the fact she was capable based upon his assessment through his interview with her was merely his opinion and the Court will not take his opinion into account in deciding on the issue as to whether she possessed a Diploma in Secretaryship as she had stated in her CV or her Job Application form;
- e) Further, the said email reflects a contradiction in facts whereby the Claimant had given testimony that she had a conversation with Mr. Jaisul Yu with regard to her Diploma in Social Science however Mr. Jaisul Yu states that he does not remember the Claimant stating that she does not have a Diploma in Social Science.

37. In view of the above-mentioned factors Mr. KK Cheah had not condoned the Claimant's misrepresentation and the claim by her that Mr. Jaisul Yu purportedly supported her is ludicrous and is without any probative basis and as such cannot be

relied upon. Similarly, with regard to Mr. Jaisul's email of 7 ½ years after the alleged matter will be dealt with by the Court with utmost caution.

38. Based on the above analysis the Company has established that the Claimant had committed the misconduct of dishonest misrepresentation of having a Diploma in Executive Secretaryship when she in fact has only Semester 1 transcript of her examination results. The Company having established that, the burden therefore shifts to the Claimant to prove her defence to call Mr. Jaisul Yu and Mr. KK Cheah as witnesses to adduce evidence in support of her defence. In this respect she has failed to call Mr. Jaisul Yu and Mr. KK Cheah to support her defence and as such the Court is entitled to invoke adverse inference against the Claimant for failing to call these two witnesses.

39. Based on the above analysis it is the Court's view that the Claimant's extensive reliance on Mr. Jaisul's email dated 30.08.2017 and 31.08.2017 as her defence to claim that the Company was aware that she did not possess the said Diploma is untenable as such a claim is without probative basis.

(v) **Is there any truth in Claimant's version when she contended that the based on Mr. Danny Yong's email which appears at page 65 of CLB-2 the audit verification conducted by HR for the year 2013 had an overall satisfaction that there is no false document found?**

40. In the Court's view the Claimant's said contention is gravely flawed as a perusal of Mr. Danny Yong's email to COW at page 70 of CLB-2 clearly shows that the audit check was for the purpose of determining the authenticity of the documents and not an audit check on education declaration. **The Claimant herself during hearing had**

admitted that the case herein is not with regards to her having a false or forged degree but rather it is a case where she has been dismissed for declaring a qualification which she did not possess.

(vi) Is there any truth in the type of Qualification that she had disclosed in the Education Declaration Form dated which she had signed on 27.07.2017 at page 14 of COB?

41. Even assuming that the Claimant had indeed informed the Company in 2010 that she does not have the Diploma, the Claimant is then again guilty of misrepresentation and making a false declaration in 2017 vide the Educational Declaration form found at page 14 of COB.

42. It is pertinent to note that the Claimant's credibility was further put to question when she had again provided with false information with regard to her qualification of Diploma in Executive Secretaryship in the Educational Declaration form provided by the Company dated 27.07.2017 at page 14 of COB. It was adduced in evidence that even at that time when the Educational Declaration form was being filled by the Claimant she had not obtained her Diploma in Executive Secretaryship. Yet she again blatantly misrepresented that she possessed the said Diploma. She also was aware that in the event her declaration is found to be untrue, it would be sufficient ground for termination.

43. The Claimant had given evidence that her understanding of what was required in the said Educational Declaration Form at page 14 of COB was merely the "field of study" which is Secretarial field and by the Claimant stating there "Diploma in

Executive Secretaryship”, she was merely stating her “level and field of study”. Using the so called “level and field of study” strategy to explain her qualification is a self-made ingenious attempt to avoid the misconduct of misrepresentation of her qualification. Any reasonable person declaring his or her qualification in the said Educational Declaration form would have clearly understood that what was required of them was the qualification that one has obtained upon completing the course. In this regard, the Claimant had testified in Court that she understands that professional certificate means a full certificate upon completing the said course. If indeed, the Claimant’s justification was that she was merely providing her “level and field of study”, she should have filled in as “Semester 1 of Diploma in Executive Secretaryship” which she had not. She even went on to say that she started and ended the course in 1999.

44. Therefore, based on the above analysis, I have no hesitation in concluding that even at the time when the Claimant filled in the Educational Declaration form and signed the second time on 27.07.2017 knowing very well that she was not in possession of her Diploma in Executive Secretaryship she still went ahead and blatantly misrepresented that she possessed the said Diploma. This is indeed a very serious misconduct of misrepresentation and in my view that in itself would be sufficient ground for termination.

(vii) Is there any truth in the Claimant’s contention that she had neither misrepresented nor falsified her academic qualifications?

45. A careful study of the information contained in her (a) curriculum vitae (CV)/resume at pages 35 to 37 of COB and/or (b) Job Application form at pages 29 to 35 of COB with regard to her qualification must only lead to an obvious conclusion that

is to say that prior to her employment, the Claimant had at all times represented to the Company that she “possessed” a Diploma in Social Sciences and a Diploma in Executive Secretaryship and that under Educational Qualification at page 32 of COB, she had the qualification of a Diploma in Executive Secretaryship which she completed and passed in year 1999. In light of her admission in Court that she never possessed it at the time and for that matter, does not even possess it even before the conclusion of the hearing makes it absolutely clear that she was dishonest from the time she applied for the job. In my view it is overwhelmingly clear that she had in truth misrepresented her academic qualifications. In the circumstances, for the Claimant to contend that she neither misrepresented nor falsified her academic qualifications is absolutely false and untenable. In my view she is certainly not a credible witness.

(viii) Is the Claimant truthful in her contention that that Exhibit CLB-3 only required the Claimant to possess at least a Professional Certificate in Secretarial Courses or related discipline but the Company now contends that the Claimant must possess a Diploma in Secretaryship?

46. In my view, the Claimant’s contention is absolutely a misleading contention for the following reasons:

- a) The Company’s case is that the Claimant does not possess the qualification she claimed to have which is the Diploma in Executive Secretaryship and not that the Claimant must possess a Diploma; and
- b) As a matter of fact, the Claimant does not even possess professional certificate in Secretaryship.

47. Besides the above misleading contention, the Claimant conveniently refers to the letter from Raffles College at 32 of CLB-2 and contends that it is a transcript or certificate which upgradable/non-upgradable and so on. In my view, it is neither of any of the above. The definition of a transcript is a documentation of a student's permanent academic record which usually means all courses taken, all grades received, all honours received and degrees, in this case Diploma conferred to a student. On the other hand, page 32 of CLB-2 is merely a letter from the Olympia Business School confirming that she has sat for Semester 1 of the said course.

48. The Claimant further attempted to urge this Court to invoke s 114(g) of Evidence Act, 1950 against the Company for not producing the maker of CLB-3 and also to invoke the Contra Proferentum rule. In my view the Claimant's request is without basis. Firstly, the Contra Proferentum rule does not apply at all in the circumstances of the case. Secondly, it is indeed peculiar for the Claimant to request the Court to invoke 114(g) on CLB-3 when it is a document of a 3rd Party and in any event, a document that is purported to be relied upon by the Claimant. Further, in any event, there is no ambiguity from the said document in what was required of a personal assistant. Hence the need to invoke s114(g) of the EA 1950 in the circumstances is irrelevant and furthermore it is also not applicable here.

(ix) Is there any merit in the Claimant's contention that the representation she made at her job application form was made with an honest and reasonable ground coupled with bona fide belief based on CLB-2 page 32 is an innocent representation and not a misrepresentation?

49. Even during the hearing, the Claimant herself had admitted in Court that she could have just stated in her resume or in her job application form that she has only

completed Semester 1 of the said Diploma, but she did not. Never once has she stated that she had only completed Semester 1 of the said Diploma or neither has she stated that the said Diploma's status is "on-going". As such, the Claimant's phrase of stating she "possessed" the said Diploma in her resume clearly reveals that her intention was at all material times was to reflect to the Company that she possessed such a Diploma. The Court is therefore of the view that the misrepresentation was not done in a bona fide belief and, the fact remains that the Claimant had misrepresented her qualification in the CV and Job Application form and therefore such an act warrants a dismissal as an appropriate punishment.

(x) Is there any merit in the Claimant's defence of condonation in that she had already informed the Company that she does not have a Diploma?

50. In principle whilst the burden of proving the misconduct rest on the Company, but since the Claimant's defence is one of condonation, the burden of proving the defence of condonation rests with the Claimant.

51. Since the Company has succeeded in proving that the Claimant did not possess the Diploma in Executive Secretaryship as represented prior to her employment, the burden then shifts to her to prove that she has informed the Company and they have condoned it. In this regard, she did not produce Mr. Jaisul Yu so that he could be cross-examined by the Company's Counsel in detail and as such it is reasonable for the Court invoke adverse inference against the Claimant for not producing Mr. Jaisul Yu.

52. I must emphasize that the Company herein had acted promptly upon discovering the Claimant's misrepresentation. Therefore, the issue of condonation or lapse of time as advocated by the Claimant does not arise.

53. Based on the above facts and analysis the Company had established on the balance of probabilities the Claimant's misconduct in that the Claimant had provided false information and misrepresented her qualification in so far as issue (a) is concerned.

(xi) Is the Claimant's dismissal justified in the circumstances of the case?

54. In respect of Issue (b), the Court will examine whether the proven misconduct constitutes just cause or excuse for the dismissal. In this regard the Court will have to determine whether under the principle of proportionality of punishment the ultimate punishment of dismissal on the facts of the instant case is justified.

55. The Court is satisfied that on the balance of probabilities the Company had established that the Claimant's conduct of having provided false information and dishonestly misrepresented her qualification to get the job amounts to a misconduct which was so serious that it had destroyed the fiduciary relationship of an employer and employee and accordingly it warrants the punishment of dismissal.

56. In the case of **Sitt Tatt Industrial Gases Sdn. Bhd. v. Puvananderan Ganasamoorthy** (Award No. 396 of 2003) the Court too held that pre-employment misrepresentation warrants for a dismissal whereby the Court held as follows:

“Pre-employment misrepresentation is a criminal offence. Being so, misrepresentation is a misconduct whereby the elements of dishonesty and deception are involved. Since the employer-employee relationship carries with it the duty of fidelity on the part of the employee and also a relationship of trust and confidence, dishonesty on the part of the employee is an attack upon the trust and confidence of the employer.

*The claimant had provided false information and misrepresented to the Company about his employment status. **Therefore, the Company had a reasonable and just cause not to be able to repose any further trust and confidence on the Claimant.** It followed that the company had just cause and excuse to dismiss the claimant.”*

57. It is not disputed that the Company dismissed the Claimant approximately 7 years from the time of the alleged misrepresentation. In this regard, in the case of **Mohamed Noordin Mohamed v. Malaysia International Shipping Corporation Bhd.** (Award No. 2250 of 2005), the discovery of the Claimant’s misrepresentation of his professional qualification was discovered some 9 years later. However, the Court held that the Company had acted promptly after it discovered the false declaration by the Claimant and there was no condonation of the misconduct of the Claimant by the Company. Applying the same principle in this case, though there has been a lapse of 7 years, the Company herein had acted promptly upon discovering the said misconduct.

58. Since the Claimant admitted that she knew she did not have the qualification of Diploma in Executive Secretaryship when she was applying for the job and at the same

time was consciously aware that her resume and Job Application form represented that she has obtained both the Diplomas, the Company is unable to repose the necessary trust and confidence to maintain her in employment. This is further substantiated with the fact that even after 7 years, she again misrepresented her qualification in the education declaration form in year 2017. In the Federal Court case of ***Norizan Bakar v. Panzana Enterprise Sdn. Bhd.*** [2013] 9 CLJ 408, the allegation was that the Claimant had been dishonest when he declared in writing that he was not serving on the board of Directors of any company when he was, in fact, at the material time found to be serving on the Board of Directors of another company. Despite the Claimant's defence there that it was a dormant company and he had forgotten about it, the Federal Court upheld the dismissal and held that the said misconduct had destroyed the trust and confidence the employer would have placed on him and with that in mind, the Court held that the employee's dismissal was fair. The same principle is equally applicable in the instant case.

Conclusion

59. In the first place the Company has adequately discharged its burden of proving that the Claimant is guilty of misconduct of misrepresentation of her qualification. Secondly, the Claimant has also in essence admitted to the said misconduct. Thirdly, not only did the Claimant misrepresent her qualification to obtain the job, even as recent as 2017 she had continued to misrepresent her qualification when she made the declaration of her qualification.

60. Based on equity and good conscience and substantial merits of the instant case I have no hesitation in concluding that based on all the authorities, the punishment of dismissal is more than warranted as the Company could no longer repose the trust and confidence in the Claimant to carry out her duties and responsibilities with impeccable integrity and honesty. In the circumstances of the instant case I am aptly convinced that the Company had discharged its burden in proving that the dismissal of the Claimant was in fact with just cause or excuse. Accordingly, the Claimant's case is hereby dismissed.

HANDED DOWN AND DATED THIS 04th DAY OF APRIL 2019

-SIGNED-

**(P. IRUTHAYARAJ D. PAPPUSAMY)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR**