IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO.: 22(30)(26)(15)(21)/4-700/16

BETWEEN

YONG PUI YEE

AND

PRICEWATERHOUSECOOPERS

AWARD NO.: 4 OF 2021

Before	:	Y.A. Tuan Paramalingam A/L J. Doraisamy - Chairman (Sitting Alone)
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	31.05.2016
Date of Mention	:	25.07.2016; 21.09.2016; 19.10.2016; 02.11.2016; 17.11.2016; 28.11.2016; 08.02.2017; 28.03.2017; 12.04.2017; 08.06.2017; 17.07.2017; 21.11.2017; 10.01.2018; 24.01.2018; 20.03.2018; 08.06.2018; 30.07.2018; 07.08.2018; 27.08.2018; 07.09.2018; 19.10.2018; 25.10.2018; 09.11.2018; 21.11.2018; 07.12.2018; 18.03.2019; 23.10.2019; 10.02.2020; 11.02.2020
Date of Hearing	:	24.09.2019; 25.09.2019; 26.09.2019; 11.10.2019; 07.11.2019; 12.12.2019; 31.01.2020; 01.09.2020; 02.09.2020; 03.09.2020
Date of Hearing of Application	:	27.09.2017
Representation	:	Mr. Muhendaran Suppiah together with Ms. Chong Wan Loo Messrs. Muhendaran Sri Counsel for the Claimant Ms. Wong Keat Ching together with Ms. Teoh Alvare Messrs. Zul Rafique & Partners 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 **Yong Pui Yee** (hereinafter referred to as "*the Claimant*") by **PricewaterhouseCoopers** (hereinafter referred to as "*the Company*") on 1 July 2015.

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 1 July 2015.

I. Procedural History

[2] The Industrial Court received the letter pertaining to the Ministerial reference under Section 20(3) of the Industrial Relations Act 1967 on 20 June 2016.

[3] The matter was fixed for mention before Court No. 21 (before the learned Chairman Puan Siti Salwa Binti Musa) on 25 July 2016, 21 September 2016, 19 October 2016, 2 November 2016, 17 November 2016 and 28 November 2016. On 28 November 2016, the learned Chairman Puan Siti Salwa Binti Musa allowed the Claimant's application to transfer the case to Court No. 15 in order for it to be consolidated with Case No. 15/4-728/16 (*Yong Pui Yee v. CIMB Investment Bank*

Berhad). An Interim Award No. 1335 of 2016 was handed down to that effect on 29 November 2016.

[4] The matter was then fixed for mention before the learned Chairman Puan Reihana Bte. Abd. Razak at Court No. 15 on 8 February 2017, 28 March 2017, 12 April 2017, 8 June 2017 and 17 July 2017.

[5] On 27 September 2017, the Company's application to consolidate this matter with Case No. 15/4-728/16 was heard before the learned Chairman Puan Reihana Bte. Abd. Razak. The application was however dismissed and an Interim Award No. 1485 of 2017 was handed down to that effect on 17 October 2017.

[6] The matter was fixed for further mentions at Court No. 15 on 21 November 2017, 10 January 2018, 24 January 2018, 20 March 2018, 8 June 2018, 30 July 2018, 7 August 2018, 27 August 2018 and 7 September 2018.

[7] The file was then transferred from Court No. 15 to Court No. 26 (Task Force) for hearing before the learned Chairman Tuan Yong Soon Ching, under the instructions of the President of the Industrial Court of Malaysia on 5 October 2018.

[8] The matter was fixed for mention before Court No. 26 on 19 October 2018, 25 October 2018, 9 November 2018, 21 November 2018 and 7 December 2018.

[9] On 13 March 2019, the President of the Industrial Court gave instructions for the hearing on the 18, 19 and 25 March 2019 to be postponed due to a complaint raised by the Claimant *vide* letter dated 12 March 2019. The matter was thereafter mentioned before the learned Assistant Registrar on 18 March 2019, who then fixed new hearing dates for the 24, 25 and 26 September 2019.

[10] The file was transferred from Court No. 26 (Task Force) to Court No. 30 (Task Force) (where I was the Chairman then), under the instructions of the President of the Industrial Court of Malaysia on 1 August 2019.

[11] The trial proceeded before me in Court No. 30 on 24 September 2019, 25 September 2019, 26 September 2019, 11 October 2019, 7 November 2019 and 12.12.2019. The case was heard together with Case No. 30(26)(15)/4-728/16 (*Yong Pui Yee v. CIMB Investment Bank Berhad*).

[12] The case was thereafter transferred from Court No. 30 to this Court, i.e. Court No. 22, upon the directions of the learned President of the Industrial Court, on 7th January 2020, due to my appointment as Chairman of Court No. 22, for the purposes of continuing with the trial and the subsequent handing down of an Award.

[13] The trial continued in Court No. 22 on 31 January 2020. The trial dates of 10 and 11 February 2020 however had to be postponed as the Claimant's Counsel informed the Court that the Claimant had become uncontactable and was not present

in Court on those dates. The Court granted the postponement as the trial was at the stage of the Claimant's case with the Claimant being the sole witness. The trial recommenced on 1 September 2020 and concluded on 2 September 2020.

II. The Parties' Position on the Merits

(a) <u>The Claimant</u>

[14] The Claimant commenced employment with the Company as an Associate under the CIMB Fusion Programme effective 18 September 2012.

[15] The terms of the contract, *inter alia*, are:-

i. the Claimant would be employed for a total period of 4 years;

ii. during the first 2 years of the programme, the Claimant would be employed by the Company;

iii. in the 3rd year of the programme, the Claimant would be employed by CIMB Investment Bank Berhad ("*CIMB*"); and

iv. in the final year, the Claimant would be employed back by the Company.

[16] The Claimant was also assigned a PwC-CIMB Training Contract ("*the Training Contract*") whereby the Training Contract indicates that the Claimant was employed by both the Company and CIMB.

[17] The Claimant was also granted a loan by the Company to pay for the tuition fees for the preparation courses for the ICAEW ACA qualification exams and executed a Loan Agreement dated 18 December 2012. The said Loan Agreement confirms that the Claimant is an employee of the Company.

[18] *Vide* the Company's letter dated 27 December 2012, the Claimant was informed that she had been confirmed in her position as an Associate effective from 18 December 2012.

[19] Throughout her 21 months of service with the Company, the Claimant was appraised as an employee whose overall performances were outstanding and above expectations.

[20] On 30 June 2014, the Claimant had completed the first stage of the CIMB Fusion Programme and was about to join CIMB as a Senior Associate as per the terms of the contract of employment with the Company. The Company *vide* its letter dated 30 June 2014 congratulated the Claimant's success and stated that the Claimant would be employed back by the Company in one year's time.

[21] The Claimant started working with CIMB on 1 July 2014 and was due to report back to the Company on 1 July 2015. However, on 26 June 2015, when the Claimant's service with CIMB under the second stage of the CIMB Fusion Programme was nearing the end, she received a call from one En. Ashraf, i.e. the Company's Human

Resources personnel, informing her that her reporting back to the Company on 1 July 2015 had been put on hold.

[22] The Company *vide* its email dated 30 June 2015 confirmed that the Claimant is not required to report for duty on 1 July 2015 until further notice. However, the Company did not provide any reason for this.

[23] *Vide* its email dated 2 July 2015, the Company requested the Claimant to go for a medical assessment at the Company's panel clinic. The Claimant went to the Company's panel clinic on 3 July 2015 and completed the medical check-up. *Vide* her email dated 6 July 2015, the Claimant attached a written statement as to what had transpired between the Company and herself between 26 June 2015 to 3 July 2015.

[24] At a meeting on 23 July 2015, the Claimant was informed that the Company could not extend her employment under the CIMB Fusion Programme. *Vide* email dated 3 August 2015 from the Company's Senior Manager of Human Resources, it was confirmed that the Claimant had been removed from the CIMB Fusion Programme on the grounds that her behaviour was not aligned with the requirements of a Fusioner and thus was not suitable for the Programme. The Company instead offered the Claimant a fixed term employment contract for 12 months.

[25] The Claimant *vide* her email dated 5 August 2015 disputed the grounds of her termination and stated that she was unable to accept the 12 months fixed term contract that was being proposed.

[26] The Company replied *via* their email dated 8 August 2015 stating that the Claimant did not dispute the alleged reasons of her removal when they were communicated to her at the meeting on 23 July 2015. The Company also stated that no offer letter would be issued to the Claimant as she had rejected the 12 months fixed term contract. The Claimant however denied in her email of 11 August 2015 the Company's allegation that she had not disputed the reasons for her removal during the meeting on 23 July 2015.

[27] The Claimant thereafter on 19 August 2015 filed a complaint to the Industrial Relations Department under Section 20 of the Industrial Relations Act 1967 for unfair dismissal and sought the remedy of reinstatement.

[28] *Vide* email dated 28 October 2015 the Company offered to re-employ the Claimant under a fixed term contract for 18 months for the position of Senior Associate. The Claimant however replied *vide* email dated 3 November 2015 that she was unable to accept the offer of re-employment as she wanted to be reinstated to her former position rather than being given a fresh offer of employment.

[29] The Company *vide* letter dated 23 November 2015 again offered to re-employ the Claimant under a fixed term contract for the position of Senior Associate for a period of 18 months. Further, the Company was willing to pay the Claimant a sum of RM20,000.00 as settlement to resolve the matter.

[30] The Claimant replied *via* letter dated 30 November 2015 that:-

i. her employment was terminated by the Company effective 1 July 2015 when she was removed from the CIMB Fusion Programme;

ii. the termination was without just cause and excuse where no warning whatsoever had been given to the Claimant of her poor performances or unsuitability before the Company dismissed her on this ground. No counselling had been given to guide the Claimant towards achieving the expectations that she had allegedly failed to meet; and

iii. as such, her claim for reinstatement is a valid recourse. She also reiterated that she was unable to accept the Company's offer unless certain conditions were fulfilled by the Company.

[31] The Company replied *vide* letter dated 10 December 2015 that it is not agreeable to the Claimant's conditions of reinstatement and once again made the offer of the fixed term contract. They also offered an *ex gratia* payment of RM25,000.00. The Claimant again responded *vide* letter dated 17 December 2015 that she was unable to accept the Company's offer as it was a fresh offer of employment when she was in fact seeking a reinstatement.

[32] The Claimant contends that she had been dismissed by the Company despite there being no express letter of termination issued by the Company and that her dismissal had been done without just cause or excuse. The said dismissal had violated the Claimant's legitimate expectation to be gainfully employed.

[33] The Claimant prays to be reinstated without any loss of wages, allowance, service, seniority, privileges or benefits of any kind. She also prays that any order for backwages to include the following consequential orders:-

i. the Company pays all the statutory contributions payable by the Company towards the said backwages, from the date of dismissal, including but not limited to Employment Provident Fund (EPF) and/or SOCSO;

ii. the Company pays all interests and/or dividends that are payable on such EPF and/or SOCSO contributions from the date of dismissal;

iii. the Company reimburses all tuition and examination fees incurred for the ICAEW ACA qualification from the date of dismissal, and the Company writes off RM15,000.00 from the loan sum as per the Loan Agreement; and

iv. the Company reinstates the PwC-CIMB Training Contract.

[34] In addition, the Claimant seeks to move this Court to order punitive compensation and/or aggravated compensation and/or exemplary compensation to the Claimant if the Court is not minded to grant reinstatement to the Claimant.

(b) <u>The Company</u>

[35] The Company denies that it had dismissed the Claimant from its services but rather the Claimant was removed from the PwC-CIMB Training cum Employment, which was also known as the CIMB Fusion Programme. Thus, she could not continue under the CIMB Fusion Programme.

[36] The events leading to the Claimant's removal from the CIMB Fusion Programme are as follows:-

i. *Vide* the Company's letter dated 4 April 2012 and Memorandum of Terms and Conditions ("*the 1st Letter of Offer*"), the Claimant was offered the position of Associate in the Company's Assurance Line of Service for a fixed term of 21 months under the CIMB Fusion Programme effective 18 September 2012;

ii. *Vide* letter dated 16 April 2012 ("*the 2nd Letter of Offer*"), CIMB offered the Claimant the position of Assistant Manager under the Programme in the 3rd year of the Programme. The 2nd Letter of Offer also provides that the Claimant's employment is subject to CIMB's Main Terms and Conditions of Employment and the ACA Tripartite Training Contract ("*Tripartite Training Contract*");

iii. The salient terms of the CIMB Fusion Programme are as follows:-

a. The Claimant would be employed for a total period of 4 years under the CIMB Fusion Programme wherein:

1. During the 1st year and 2nd year of the CIMB Fusion Programme, the Claimant would be employed by the Company;
2. During the 3rd year of the CIMB Fusion Programme, the Claimant would be employed by CIMB; and
3. During the 4th year of the CIMB Fusion Programme, the Claimant would be re-employed by the Company.

b. At any time during the duration of the CIMB Fusion Programme, if the Claimant's performance fails to meet the Company and/or CIMB's expectation, the Company and/or CIMB would inform the Claimant and decide on the appropriate course of action.

iv. On 18 September 2012, the Claimant commenced employment with the Company as per the terms of the 1st Letter of Offer and the Memorandum of Terms and Conditions executed between the Claimant and the Company;

v. On 18 December 2012, the Tripartite Training Contract was executed between the Claimant, the Company and CIMB. On the same date, the ICAEW Study Loan Agreement-CIMB Fusion Programme was executed between the Claimant and the Company;

vi. The Claimant had completed the first milestone (1st and 2nd year) of the CIMB Fusion Programme with the Company on 30 June 2014;

vii. The Claimant then commenced her second milestone (3rd year) of the CIMB Fusion Programme with CIMB for 1 year effective 1 July 2014 to 30 June 2015;

viii. Sometime in June 2015, the Company was informed by CIMB of CIMB's intention to remove the Claimant from the CIMB Fusion Programme. Therefore on 26 June 2015, the Claimant was verbally informed by the Company that the Claimant's re-employment (third milestone, i.e. 4th year) with the Company was put on hold until further notice;

ix. *Vide* email dated 30 June 2015, the Claimant was informed that she was not required to report to the Company on 1 July 2015 until further notice;

x. During a meeting on 23 July 2015, the Company informed the Claimant that CIMB found that the Claimant did not meet the CIMB Fusion Programme's requirement. As such, both CIMB and the Company jointly decided to remove the Claimant from the CIMB Fusion Programme;

xi. *Vide* email dated 3 August 2015, the Claimant was further informed that the Company was willing to offer the Claimant a fixed term contract of 12 months. However, the Claimant rejected the offer;

xii. *Vide* letter dated 10 August 2015 from CIMB, the Claimant was informed that the Company and CIMB had jointly decided to remove the Claimant from the CIMB Fusion Programme on the basis that she did not meet the performance expectations and requirements expected under the CIMB Fusion Programme. As such, as provided for under the 2nd Letter of Offer, the contract had ceased automatically effective 1 July 2015. At all material times, there was no Letter of Offer offered nor signed by the Claimant and the Company for the 4th year of the CIMB Fusion Programme;

xiii. The Claimant thereafter filed representations against the Company and CIMB pursuant to Section 20 of the Industrial Relations Act 1967;

xiv. *Vide* email dated 28 October 2015, the Company had again enclosed an 18 months fixed term employment contract and informed the Claimant that the contract shall take into effect from the date of her acceptance (if she was accepting) and the contract duration was to enable her to gain on-the-job experience and this would help her to build her technical and core competencies as a Chartered Accountant. The Claimant however rejected this offer;

xv. *Vide* letter dated 23 November 2015, the Company informed the Claimant that there was no dismissal. The Claimant was removed from the CIMB Fusion Programme. Therefore, she could not continue under the said Programme. However, in the same letter, on a goodwill basis, the Company gave the Claimant another offer

to be employed with the Company which was the best possible offer closest to the remedy of reinstatement she was seeking as follows:-

a. A fixed term contract for the position of Senior Associate for a period of 18 months which was no less favourable than if the Claimant had continued on the Programme for the 4th year; and
b. A sum equivalent to 4 months' basic monthly salary (i.e. RM5,000 x 4 months = RM20,000) which covered the period from her removal of the CIMB Fusion Programme;

The Claimant however rejected this offer unless certain conditions were met by the Company. She also insisted that her employment had been terminated;

xvi. *Vide* letter dated 10 December 2015, the Company reiterated that there had been no dismissal and further stated:-

a. Reinstatement was not a valid course in this case;
b. As the Claimant's contract with CIMB had expired, the Claimant's employment with CIMB had automatically ceased effective 1 July 2015. There was thus no termination by the Company;
c. Since the Claimant was removed from the CIMB Fusion Programme, the Company was not in a position to unilaterally reinstate the Claimant to the CIMB Fusion Programme without CIMB's agreement;

d. However, as a gesture of goodwill and strictly without prejudice to the Company's position that there had been no termination of her employment with the Company, the Company offered to employ the Claimant a fixed term contract of 18 months as a Senior Associate on terms no less favourable than if she had continued as a 4th year Associate under the CIMB Fusion Programme plus an *ex gratia* sum of RM25,000.00 equivalent to 5 months' basic salary;

xvii. However by letter dated 17 December 2015, the Claimant did not accept the Company's offer of settlement. As such, the Claimant's representations against the Company and CIMB pursuant to Section 20 of the Industrial Relations Act 1967 were then referred to the Industrial Court in separate cases.

III. The Role Of The Industrial Court

[37] It is established law that the function of the Industrial Court in a Section 20(3) Industrial Relations Act 1967 is two-fold, i.e. to determine:-

(i) whether there is a termination of the Claimant's employment contract on the facts and whether it had been made out by the Company; and

(ii) whether the termination of the Claimant's employment contract was done with or without just cause or excuse.

[38] In the case of **Wong Yuen Hock v. Syarikat Hong Leong Assurance & Another Appeal [1995] 3 CLJ 344** it was held by the Federal Court (*vide* judgment of Mohd Azmi bin Dato' Haji Kamaruddin FCJ):-

> "*On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act (unless otherwise lawfully provided by the terms of the reference) is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal. In our opinion, there was no jurisdiction by the Industrial Court to change the scope of reference by substituting its own reason*".

[39] And in the case of **Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129** the Federal Court (*vide* the judgment of Raja Azlan Shah CJ) held:-

> "*Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the*

court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it".

IV. Issues To Be Decided

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

(i) whether there was a dismissal on the facts;

(ii) and if so, whether the dismissal was done with just cause and excuse;

V. The Court's Findings And Reasons

(i) Whether there was a dismissal on the facts

(a) Was the CIMB Fusion Programme/ACA Tripartite Training Contract an employment contract?

[41] The CIMB Fusion Programme which the Claimant enrolled under provided a graduate with 2 separate experiences under 2 separate employment engagements with the Company and CIMB respectively . It is essentially a training programme for a total period of 4 years wherein:-

i. for the first 2 years, the Claimant would be employed by the Company;

ii. for the following 3rd year the Claimant will be employed by CIMB;

iii. for the final 4th year, the Claimant will be 'employed back' by the Company.

[42] Thus, the CIMB Fusion Programme comprised of 3 employment contracts. The ACA Tripartite Training Contract which was executed by the Claimant, the Company and CIMB (*at pp. 15-21 of COB-1(P)*) provides that these 3 employment contracts were for fixed terms. Clause 2 of the ACA Tripartite Training Contract (*at p. 15 of COB-1(P)*) provides:-

> "*The Approved Training to be provided to the Trainee by the Training Organisation(s) will take the following approach:-*
>
> *First 18 months (excluding probation period) – Training with PwC under an eighteen (18) months period after confirmation of Employment contract*
>
> *Next 12 months – Training with CIMB under a twelve (12) month Employment contract*
>
> *Remaining 18 months – Training with PwC under a further eighteen (18) month Employment contract*".

[43] The individual fixed term employment contracts envisaged under the ACA Tripartite Training Contract were executed by the Claimant with the Company for the period from 18 September 2012 to 30 June 2014 (*the 1st Letter of Offer [at pp. 1-8 of COB-1(P)]*) and with CIMB for the period from 1 July 2014 to 30 June 2015 (*the 2nd Letter of Offer [at pp. 9-14 of COB-1(P)]*).

[44] The Claimant had duly completed the first fixed term employment contract with the Company and was at the tail-end of her second fixed term employment with CIMB when she was informed by one En. Ashraf from the Company *vide* email dated 30 June 2015 (*at p. 1 of COB-2(P)*) that she would not be required to report for duty with the Company on 1 July 2015. This reporting for duty on 1 July 2015 pertains to the third fixed term employment contract with the Company, which had yet to be executed by the Claimant and the Company. The Claimant thereafter received a letter dated 10 August 2015 from CIMB (*at p. 73 of COB-1(P)*) that CIMB and the Company had jointly decided to remove the Claimant from the CIMB Fusion Programme. In short, the third fixed term employment contract with the Company never took off following the Claimant's removal from the CIMB Fusion Programme.

[45] It is the Claimant's contention that the entire CIMB Fusion Programme which was governed by the ACA Tripartite Training Programme was in essence an employment contract by itself and that by the very fact that she was removed from the programme after the first two employment contracts with the Company and CIMB, without being given the third employment contract with the Company commencing 1 July 2015 amounts to a dismissal.

[46] The Company however has a two-pronged response to the Claimant's contention. Firstly, the CIMB Fusion Programme and the ACA Tripartite Training Contract (which was entered into in order to satisfy one of the requirements for the Claimant's ICAEW membership which required her to complete a minimum of 36 months training) was for all intents and purposes a training programme and was never

meant to be an employment contract. For the purposes of providing the training, the Claimant was placed under separate and individual fixed term employment contracts with the Company and CIMB respectively. Secondly, at the time the Claimant was removed from the CIMB Fusion Programme, her fixed term employment contract with CIMB had expired by effluxion of time. There did not exist another employment between the Claimant and the Company at the point of her removal from the CIMB Fusion Programme.

[47] It is thus pertinent to look at the very nature and purpose of the CIMB Fusion Programme/ACA Tripartite Training Contract to determine whether it was a mere training programme or whether it was in fact an employment contract, be it fixed or otherwise.

[48] The nature of the CIMB Fusion Programme was explained by Pn. Nor Sherriza Binti Nor Rashidi (COW-4; the then Senior Manager in charge of Human Resources in PwC Assurance Line of Service) in her Supplementary Witness Statement (*Q & A Nos. 4 & 5 of COWS-4(B)*):-

> "*4. Q: Can you explain further the Fusion Programme being a unique tripartite training programme?*
>
> *A: The Fusion Programme was a unique tripartite training programme between the selected trainee i.e. the Claimant, PwC and CIMB.* ***The tripartite training programme was designed to offer all management trainees who were fresh graduates from all academic disciplines the***

opportunity to go through job rotation between PwC and CIMB to gain experience working in two different industries as well as in different departments and teams within the organisations. So, the idea is for the trainee to have a feel of which area of work she prefers and at the same time for us (CIMB and PwC) to assess her suitability to be offered full time after the end of the training programme.

The tripartite training programme was aimed to challenge the trainee's robust ability in navigating the complexities of the business and to thrive within different environments.

5. *Q: What happens at the end of the Fusion training programme?*

A: Upon successful completion of the programme, the trainee can state her preference whether to join CIMB or PwC and ***it was up to the discretion of either PwC or CIMB to then decide whether to offer full time employment to the trainee subject to suitability, vacancy and headcount budget. <u>There was no guarantee that the trainee would get a position in either PwC or CIMB at the end of the programme</u>***".

(Emphasis added)

[49] The CIMB Fusion Programme was thus intended to be a training programme wherein the trainees were given the requisite trainings *via* job rotations under two different working environments, i.e. one with the Company and the other with CIMB, to assess their suitability for full time employment. In order for the trainings to be carried out, the trainees were placed under fixed term employment contracts with the Company and CIMB respectively. Thus, the only employment contracts that existed were the separate fixed term employment contracts entered into by the Claimant with the Company (on 4 April 2012 for the period 18 September 2012 to 30 June 2014) and CIMB (on 1 July 2014 to 30 June 2015).

[50] The CIMB Fusion Programme and the ACA Tripartite Training Contract was not an employment contract. It merely spelt out the trainings to be provided to the Claimant. It is even as clear as day when Clause 6 of the ACA Tripartite Training Contract (*at p. 16 of COB-1(P)*) provides in no uncertain terms that the Training Contract is not an employment contract and that the separate and individual fixed term employment contracts shall govern the Claimant's employments with the Company and CIMB respectively:-

> "***For the avoidance of doubt, this Training Contract is not a contract of employment between the Trainee and the Training Organisations***. *The terms of the Trainee's employment is governed by the Offer Letter of Employment dated* ***18 September 2012*** *(including any amendments thereto) with PwC, the Offer Letter of Employment dated* ***16 April 2012*** *with CIMB (including any amendments thereto) and the subsequent Offer Letter of Employment dated* ***4 April 2012*** *(including*

any amendments thereto) with PwC and the Training Organisations respective Employees' Handbook(s) (hereinafter referred to as the "Employment Contract")".

(Emphasis added)

[51] The Claimant herself admitted during cross-examination that the ACA Tripartite Training Contract was not an employment contract and that she was employed under consecutive fixed term contracts over a period of 48 months, structured based on the said Training Contract. She also admitted that the third employment contract with the Company was never executed and that at the time of her removal from the CIMB Fusion Programme, her last employer was CIMB.

[52] In the High Court decision of **Sime Darby Auto Selection Sdn Bhd v. Lim Boon Leong & Anor [2019] 1 LNS 1312** it was held by Nordin Hassan J (as His Lordship then was):-

"*Having accepted the terms and conditions of the contract of employment, the 1st respondent is bound by it and this court must give effect to the said terms and conditions as explained by the Court of Appeal in the case of* Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 *in the following words:*

"It is trite law that the primary duty of a Court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is

*embodied**.... If the words are unambiguous, the Court must give effect to them**, notwithstanding that the results may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. **The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered invonvenient or unjust**..... "*

Further, it is also instructive to make reference to the Federal Court case of Affin Bank Berhad v. Mohd Kasim @ Kamal bin Ibrahim [2013] 1 CLJ 465; (Civil Appeal No. 02-36-2011(W)) *where it states the following:*

*The parties are now bound by their new contract of employment. **Once the Respondent accepted the new terms of the contract, he is deemed to have taken the benefit of the contract wholly, in other words he cannot now be seen to approbate and reprobate from the contract he has agreed to**.*

[53] Counsel for the Claimant submits that the alleged fact that the CIMB Fusion Programme or the ACA Tripartite Training Contract are in themselves not an employment contract were not even pleaded by the Company and that this had taken the Claimant by surprise as the Company had radically departed and adopted a totally different position from its pleaded case. With due respect to the Claimant's Counsel, the Court is unable to agree with the Claimant's contention that the Company had departed from its pleadings. It is evident from paragraphs 7.14, 7.17, 13 and 17 of the

Statement In Reply that the Company's position had always been that there in fact had been no dismissal and that '**the remedy of reinstatement is not available against the Company <u>given the terms and conditions of the Programme</u>**'. Pursuant thereto, the Company had produced the ACA Tripartite Training Contract before this Court to show the relevant term which provides that the CIMB Fusion Programme is for all intents and purposes not an employment contract. It is a rule of pleadings that one must state facts but not the evidence by which they are to be proved. The fact in issue between the parties would be the *factum probandum*, i.e. the fact to be proved. How that fact is to be proved is by way of evidence, i.e. the *facta probantia*, which would be relevant at the trial but do not form material facts for pleading purposes.

[54] In any event, the Company had already pleaded that there was no existing employment contract between the Claimant and the Company at the time of her removal from the CIMB Fusion Programme. In fact, it is for the Claimant to prove to this Court that an employment contract still subsisted and that the CIMB Fusion Programme and the ACA Tripartite Training Contract formed that employment contract since that is the fact in issue that the Claimant wants this Court to believe.

[55] The Claimant contends that after the second employment contract with CIMB, it was incumbent upon the Company to employ her back under a third employment contract. The Company on the other hand responds by relying on Clause 5(iii) of the 1st Letter of Offer (*at p. 3 of COB-1(P)*) and Clause 7(c) of the 2nd Letter of Offer (*at p. 10 of COB-1(P)*) under the heading of 'CIMB Fusion Programme' which provides:-

"*At any time during the duration of the Programme, if your performance does not meet the Firm and/or CIMB's expectation, the Firm and/or CIMB will inform you and decide on the appropriate course of action*"

[56] COW-4 testified that the term "*appropriate course of action*" under the said Clause 5(iii) of the 1st Letter of Offer and Clause 7(c) of the 2nd Letter of Offer would include the decision to removal the Claimant from the CIM Fusion Programme.

[57] Being a Training Programme, it is incumbent on the Claimant, being the trainee, to satisfy the Training Organisations (i.e. the Company and CIMB) with regards to her performance and job suitability. It would be best left to the Training Organisations to assess the Claimant's performance and they have the management prerogative to decide on the appropriate course of action. It is not for this Court to interfere with the management prerogative of the Training Organisations in deciding how the training should be conducted or how the Training Organisations should conduct themselves towards the Claimant.

[58] In the circumstances, the Company was not obliged to employ the Claimant under a third employment contract when a decision had already been taken to remove the Claimant from the CIMB Fusion programme.

[59] Counsel for the Claimant also submits that it is a mandatory requirement under the Claimant's individual employment contracts with the Company and CIMB

respectively that the Claimant was to be employed back with the Company in the final year. Once again, with due respect, the Court is not with the Claimant's Counsel on this point. It is clear that both the 1st Letter of Offer (between the Claimant and the Company) and the 2nd Letter of Offer (between the Claimant and CIMB) were for separate fixed term employment contracts respectively under the CIMB Fusion Programme. The provisions contained in the individual fixed term employment contracts would only govern the rights and obligations of the contracting parties within the four corners of the respective contracts and does not overreach onto rights and obligations beyond the said contracts. Thus, the Claimant cannot compel the Company to enter into a third employment contract by relying on the expired fixed term employment contracts, i.e. the 1st Letter of Offer and the 2nd Letter of Offer. The contracting parties certainly did not intend that to be the scenario under the CIMB Fusion Programme. The ACA Tripartite Training Contract spells out the true intention and purpose of the CIMB Fusion Programme in that the entire Programme was in essence a training contract and the Claimant was placed under the Company and CIMB under separate fixed term employment contracts in order to gain the necessary working experience required under the Programme and to qualify for the ICAEW membership.

[60] Thus, it is this Court's finding that the CIMB Fusion Programme and the ACA Tripartite Training Contract was not an employment contract. The ACA Tripartite Training Contract does not spell out any terms of employment. If at all it was intended by the parties to be an employment contract *per se*, then surely there would not arise any need to insert specific clauses in the ACA Tripartite Training Contract with regards to the entry into separate fixed term employment contracts by the Claimant with the

Company and CIMB. The first two fixed term employment contracts of the Claimant with the Company and CIMB had expired by way of effluxion of time. Thus, reinstatement is impossible under such circumstances, and it naturally follows that there can be no question of backwages or compensation *in lieu* of reinstatement (**Unilever (M) Holdings Sdn Bhd v. So Lai [2015] 2 ILR 265**). The Claimant's last employer at the time of her removal from the CIMB Fusion Programme was CIMB, and not the Company. The Company was not obliged to employ the Claimant back under a third employment contract as she had already been removed from the CIMB Fusion Programme.

(b) The Claimant's behavioural and performance expectation issues

[61] The Claimant contends that the allegation of her behaviour not being aligned with the requirements under the CIMB Fusion Programme was never stated in CIMB's letter of 10 August 2015 *(at p. 73 of COB-1(P)*) and further that the Company had failed to provide a prior warning letter to the Claimant and did not take the initiative to find out whether CIMB's allegations were true.

[62] COW-4 however explained that the Claimant, at the material time, was still an employee of CIMB and as such it was not for the Company to interfere with CIMB's actions. She further testified that the Company trusted CIMB's judgment in doing the necessary according to their performance management system and to assess the performance accordingly. The Court does not find anything amiss in the stand taken by the Company, taking into account they were not the Claimant's employer at the material point in time.

[63] With regards to the Claimant's contention that no warning letter was given to the Claimant pertaining to her alleged behavioural and performance issues, this Court is of the opinion that a strict requirement of warning applicable to permanent employees would not be suitable for the case at hand. In this case, the Claimant was a trainee. Her employment with either the Company or CIMB was not even guaranteed at that point in time, as it fell to be assessed at the completion of the entire CIMB Fusion Programme. As such, the principles enunciated in **Ireka Construction Berhad v. Chantiravathan a/l Subramaniam James [1995] 2 ILR 11**, which concerned warnings with regards to poor performance of full time employees, would not be applicable here. The Claimant, being a trainee under a graduate programme, was constantly assessed by the Training Organisations, in particular CIMB, as she had no previous working experience and thus ought to have known the performance expectations of CIMB from time to time under the training programme. The element of warning with regards to poor performance is thus not essential in cases involving trainees under a graduate programme.

[64] The Claimant's contention that the said letter of 10 August 2015 is a termination letter is also wide off the mark. The said letter merely states that CIMB and the Company had jointly decided to remove the Claimant from the CIMB Fusion Programme. As the CIMB Fusion Programme and the ACA Tripartite Training Contract was not an employment contract, there was no dismissal from employment to begin with. The Claimant's fixed term employment contract with CIMB had automatically ceased on 1 July 2015.

[65] The Court is in agreement with the submission of the Company's Counsel that at the time of the Claimant's removal from the CIMB Fusion Programme, the Claimant was the employee of CIMB and thus she was bound only by the terms and conditions set by CIMB. The performance evaluation done during the Claimant's employment with CIMB did not involve the Company.

(ii) If there was a dismissal, whether it was done with just cause and excuse

[66] As it is this Court's finding that the CIMB Fusion Programme and the ACA Tripartite Training Contract is not an employment contract, thus there had been no dismissal under it. The Claimant's two fixed term employment contracts with the Company and CIMB had naturally expired by effluxion of time. It is erroneous for the Claimant to seek a reinstatement under Section 20 of the Industrial Relations Act 1967 under the CIMB Fusion Programme and the ACA Tripartite Training Contract. The third employment contract between the Claimant and the Company was never executed and as such reinstatement has become an impossibility in this circumstance. There is simply no "former employment" that the Claimant could be reinstated to. Any claims that the Claimant may have under the CIMB Fusion Programme and the ACA Tripartite Training Contract may lie in a civil claim, but not under Section 20 of the Industrial Relations Act 1967.

[67] Notwithstanding the third employment contract was not executed, the Company nevertheless out of goodwill made 4 offers of fixed term contracts on terms that were no less favourable than if she had continued as a 4th year Associate under the CIMB

Fusion Programme. In fact the final offer was on 23 November 2015 whereby the Company, *inter alia*, offered in their letter to the Claimant (*at p. 12-19 of COB-2(P)*):-

> "*Be that as it may, on a good will basis, PwC wishes to give you the best possible offer which is closest to your remedy of reinstatement. This is PwC's* ***final offer*** *for settlement to amicably resolve the above matter:-*
>
> *(a) a fixed term employment contract for the position of Senior Associate for a period of 18 months effective from the date of acceptance of this final offer. The offer of a fixed term employment contract is no less favourable than if you had continued on the CIMB Fusion Programme for the final year (4th year). A copy of the fixed term contract employment contract is enclosed herewith; and*
>
> (b) *a sum equivalent to 4 months basic monthly salary (i.e. RM5,000 x 4 months =* ***RM20,000.00****) which covers the period from your removal of the CIMB Fusion Programme*".

[68] The Claimant however rejected the Company's offer(s) stating that the Company's offer was done in a half-hearted manner and not on a good will basis and proceeded to impose 9 conditions of her own before she was even willing to consider the Company's offer.

[69] The Company had *vide* their letter to the Claimant on 10 December 2015 stated in no uncertain terms that the Claimant's argument of reinstatement is not valid and that her employment contract with CIMB had expired. Since the Claimant was

removed from the CIMB Fusion Programme, the Company rightly stated that they were in no position to unilaterally reinstate her back into the said Programme.

[70] The Court also notes from the conditions that the Claimant had set out in her email of 30 November 2015 (*exhibit CL-18 of the Statement of Case*) that she had insisted on the fixed term employment contract being offered by the Company to be backdated to 1 July 2015. In other words, the Claimant wanted 5 months to be taken into account without having undergone any training for the said period. The Company in their letter of 10 December 2015 disagreed with this condition as it would mean the Claimant missing out on 5 months of training, but was prepared to compensate her for the 5 months' salary. It is evident that the Company genuinely wanted the Claimant to undergo proper training but the Claimant on the other hand was prepared to cut corners, purportedly to put her on par, as far as timeline is concerned, with her peers in the CIMB Fusion Programme.

[71] The Company also had offered to replace a new training contract to replace the previous ACA Tripartite Training Contract and a new ICAEW study loan agreement to replace the previous loan agreement under the CIMB Fusion Programme. Yet, the Claimant refused, insisting that she wanted CIMB's letter of removal dated 10 August 2015 to be withdrawn as otherwise she would go on record as a poor performer and not able to meet the 'fit and proper criteria' to qualify for the ICAEW membership. However, it was not possible for the Company to unilaterally revoke the letter of removal which in fact was not even issued by them, but by CIMB. In any event, the Claimant herself agreed during cross-examination that a poor performance letter does

not mean disqualification from ICAEW membership and that it was for the Qualified Person Responsible For Training ("*QPRT*") to decide her suitability for membership, which would be done only after the completion of the entire programme. Therefore, how the QPRT would be assessing the Claimant remained an uncertainty and it is certainly not for this Court to direct the QPRT on how the said assessment ought to be done.

[72] The Claimant's insistence that she be given assurance by the Company that she would be placed in the Middle Market Group as she was worried she might be placed in a department in which she had no interest in was contrary to the transfer clause in the earlier fixed term employment contracts and clearly displayed her lack of agility required under the Programme.

[73] The Court finds that the Company had to the best of their ability tried to place the Claimant back on track, maybe not as per the terms under the CIMB Fusion Programme, but under a new training contract, just to make sure she completed the 48 months of training in order to fulfil the requirements of ICAEW membership. The Claimant remained steadfast in her rejections of the Company's 4 offers, which, if she had accepted in good time, would have seen her complete her training and qualify for the ICAEW membership. The Claimant's rejections of the offers and her demands were unreasonable under the circumstances.

[74] Since there was no dismissal in the first place, the issue whether it was done with just cause and excuse does not arise.

VII. Conclusion

[75] The Claimant's fixed term employment contract with CIMB under the CIMB Fusion Programme had come to a natural end on 1 July 2015. The third fixed employment contract between the Claimant and the Company was not even executed by the time she was removed from the CIMB Fusion Programme. The Claimant's last employer was in fact CIMB, and not the Company.

[76] To compound matters, the CIMB Fusion Programme and the ACA Tripartite Training Contract was not an employment contract under which the Claimant could assert her rights under Section 20 of the Industrial Relations Act 1967. The remedy of reinstatement is clearly not applicable under the CIMB Fusion Programme and the ACA Tripartite Training Contract.

[77] There is thus no issue of unfair dismissal in this case.

[78] The Claimant's case is hereby dismissed.

HANDED DOWN AND DATED THIS 4TH DAY OF JANUARY 2021.

-Signed-

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