INDUSTRIAL COURT OF MALAYSIA

CASE NO. 27(21)/4-1554/18

BETWEEN

AZAHARI BIN MD LAZIM

AND

SPANCO SERVICES SDN BHD

AWARD NO: 2335 OF 2019

BEFORE	:	**Y. A. PUAN SAROJINI A/P KANDASAMY** - Chairman
VENUE	:	Industrial Court, Kuala Lumpur.
DATE OF ORDER OF REFERENCE	:	04.07.2018
DATE OF RECEIPT OF ORDER OF REFERENCE	:	10.07.2018
DATES OF MENTION	:	09.08.2018, 24.10.2018, 15.11.2018
DATES OF HEARING	:	26.04.2019, 29.04.2019
REPRESENTATION	:	Mr. Simrenjeet Singh Messrs. Simrenjeet Tay & Co. Counsel for Claimant Mr. David Tan Seng Keat & Ms. Aida Yasmin Cheree Mohamad Messrs. Lee Hishamuddin Allen & Gledhill Counsel for Company

REFERENCE

[1] This is a reference by the Honourable Minister of Human Resources under section 20(3) of the Industrial Relations Act 1967 for an award in respect of a dispute arising out of the dismissal of **AZAHARI BIN MD LAZIM** ('Claimant') by **SPANCO SERVICES SDN BHD** ('Company').

AWARD

THE REFERENCE

[2] The parties to the dispute are **Azahari bin Md Lazim** ('Claimant') and **Spanco Services Sdn Bhd** ('Company'). The dispute which was referred to the Industrial Court by way of a Ministerial Reference under section 20(3) of the Industrial Relations Act 1967 made on 04.07.2018 is over the dismissal of the Claimant by the Company on 25.11.2017.

DOCUMENTS

[3] The relevant cause papers before this Court are as follows:

a) Statement of Case (SOC) dated 05.08.2018;
b) Statement in Reply (SIR) dated 01.10.2018;
c) Rejoinder dated 25.10.2018;
d) Claimant's Bundle of Documents (CLB-1, CLE-1 and CLE-2);
e) Company's Bundle of Documents (COB-1, COE-1- COE-4);

f) Witness Statement by Ms. Liew Yoke Woi [CLW-1] (CLWS-1);
g) Claimant's Witness Statement (CLWS-2);
h) Company's Witness Statement by En. Zulfika bin Hamidon [COW-1] (COWS-1); and
i) Company's Witness Statement by Dato' Hamzah bin Mohd Salleh [COW-2] (COWS-2).

THE CLAIMANT'S CASE

[4] The Claimant gave evidence during the hearing. CLW-1 also gave evidence on behalf of the Claimant during the hearing.

[5] The Claimant's employment with the Company stems from its related company known as Spanco Sdn Bhd (SSB) wherein he commenced employment in SSB vide letter dated 08.03.1994 [CLB-1 p.1-3]. The Claimant contended that at all material times prior to 2017, SSB made payment in respect of his salary although there were contracts of employment between the Claimant and the Company.

[6] On 01.01.2017, the Claimant received a letter from the Chief Executive Officer of the Company and SSB, Dato' Hamzah Mohd Salleh (COW-2) informing him that effective 01.01.2017, his services will be transferred to the Company and that his previous service with SSB will be deemed continuous [CLB-1 p.14].

[7] Premised on the matters stated above, the Claimant averred that he had been working under the employment of the Company for more

than twenty-three (23) years with his last drawn salary being RM10,200.00 per month and his last employment position as a Senior Manager-Network Operations.

[8] The Claimant averred that on 24.11.2017 he received a WhatsApp message from the Director of the Company, Mr. Peter Lim requiring the Claimant to see him in the office the next day.

[9] On 25.11.2017 at around 1.25pm the Claimant attended the meeting and also present were COW-2, En. Irwan Iskandar Bin Ismail (General Manager of Company), En. Zulfika Bin Hamidon (Head of Human Resources of Company), Mr. Peter Lim and En. Syed Riaz Bin Syed Nabi (Syed Riaz), the Assistant Manager of Spanco Workshop Batu Caves. The Claimant averred that he was shocked and muddled as he was not informed that the Head Officers would be joining the said meeting. The Claimant was under an impression that the meeting would be between him and Mr. Peter Lim only as suggested in the WhatsApp conversation.

[10] At the meeting, COW-2 stated that the Company had received a letter from the Malaysian Anti-Corruption Commission (MACC) dated 17.11.2017 [COB-1 p.9] in regards the Claimant's son, Nabeel Hassan (Nabeel), who is working in P.P Auto Rawang Services Sdn Bhd (PP Auto) as having bribed a police officer for the latter to deliver the Company's vehicles for auto repair work at PP Auto. The Claimant averred that he was not involved in any of his son's daily work affairs.

[11] COW-2 also informed the Claimant that the Company's management team had conducted a company's search and found that the Claimant and Syed Riaz were named as directors and shareholders in PP Auto. The Claimant admitted that PP Auto named the Claimant and Syed Riaz as the directors and shareholders of PP Auto in order to obtain a business loan from Perbadanan Usahawan Nasional Berhad (PUNB) for the purpose of setting up a business for the sale of hardware which will be conducted in partnership with the brother of the director of PP Auto. However since the loan application was rejected, action was being taken by PP Auto to remove the Claimant and Syed Riaz as directors and shareholders in PP Auto.

[12] The Claimant averred that subsequently Syed Riaz was asked by COW-2 to leave the meeting, and thereafter COW-2 made the following statement:

> "You have only two (2) choices. To quit voluntarily, hand over all Company's belongings and you won't have to come on the coming Monday, 27th November 2017. If you refuse to quit, I will pull you to the Court."

[13] The Claimant averred that after listening to the statement by COW-2 he was depressed, indeterminate and confused. Without realising and acting under duress, the Claimant resigned on immediate basis on that day. The Claimant had also handed over all Company's properties in his possession to En. Zulfika Bin Hamidon (COW-1) as per request by COW-2.

[14] The Claimant further averred that the Company had advertised a Notice in the newspaper to announce that the Claimant and Syed Riaz are no longer employees in the Company. To the best of the Claimant's knowledge, this is the first time that the Company advertised in respect of employees who have left the Company.

[15] The Claimant asserted that his dismissal by the Company is an unfair labour practice and has caused harm to him in terms of his reputation in the industry and negated his chances of getting employed in the same industry. The Claimant prays for an order that he be reinstated to his former post without loss of wages or benefits, whether monetary or otherwise, or any alternate remedy as the Court deems fit and proper.

THE COMPANY'S CASE

[16] The Company called the following witnesses to give evidence before this Court:

a) COW-1: En. Zulfika bin Hamidon who is the Head of Human Resourcesof Company; and

b) COW-2: Dato' Hamzah bin Mohd Salleh who is the Chief Executive Officer of Company.

[17] The Company is a wholly-owned subsidiary of Spanco Sdn Bhd (SSB) which is contracted by the Government to provide services relating to the leasing and maintenance of saloon vehicles under fixed

fee contracts for ministries and agencies of the Government. By virtue of its dealings with the Government, the Company holds integrity and good conduct to be a paramount consideration and expects its employees to conduct themselves accordingly.

[18] The Company specifically deals with the maintenance of the contracted vehicles and in furtherance to the same engages with a number of Authorised Service Centres (ASC) including PP Auto.

[19] The Claimant commenced employment with SSB on 05.02.1994 as a Service Advisor vide letter of offer dated 08.03.1994. The Claimant vide letter of promotion dated 18.01.2006 was thereafter promoted to the position of Manager, Maintenance Controller & Technical [COB-1 p.4-6]. He was subsequently promoted to his last-held position as Senior Manager - Network Operations vide letter of promotion dated 14.12.2016 [COB-1 p.7]. The Company vide letter dated 01.01.2017 transferred the Claimant to the Company.

[20] The Company averred that v*ide* letter dated 17.11.2017, MACC informed the Company of a complaint made in relation to purported misconduct pertaining to the Claimant's son, Nabeel, who was at the material time employed with PP Auto, one of the Company's registered ASC.

[21] The gist of the aforementioned MACC complaint was that Nabeel had inappropriately used his authority and influence to attract vehicles which were under the management of the Company to undergo repair

and/or service in PP Auto and had paid incentives to induce customers to direct cars on behalf of the Company to PP Auto.

[22] The Company averred that as its business emanates from its contract with the Government, there were serious potential negative consequences resulting from a MACC report against the Company, which could affect the renewal of the said contract.

[23] Flowing from the above, and as part of its internal investigations in response to the MACC letter, the Company had conducted a search on PP Auto through RAM Credit Information (RAMCI) on 23.11.2017. The RAMCI search report reflected two of the Company's employees, namely the Claimant and Syed Riaz as the directors and shareholders of PP Auto with the Claimant holding the majority shares (66%) since 04.01.2016.

[24] During the meeting on 25.11.2017, the Claimant admitted and acknowledged that he together with Syed Riaz were indeed shareholders and directors of PP Auto. The only defence tendered by the Claimant was that he had agreed to become a shareholder and director of PP Auto to obtain a loan from PUNB.

[25] Following the meeting, the Claimant had prepared and tendered the letter dated 25.11.2017 resigning with immediate effect, which was received and accepted by the Company on or around 4.50pm that same day.

[26] The Company had accepted the Claimant's resignation from the Company with immediate effect *vide* letter dated 25.11.2017 [COB-1 p.17]. The Claimant then handed over all Company's properties and prepared a handwritten checklist [COB-1 p.18].

[27] Subsequently, vide letter dated 16.01.2018 [COB-1 p.19], the Company informed the Claimant that while it had accepted his immediate resignation without requiring him to serve his two months' notice (or claiming in *lieu* thereof), he was required to pay back monetary advances previously paid to him totalling RM6,629.95.

[28] The Company thereafter advertised a Notice in a newspaper to announce that the Claimant and Syed Riaz are no longer employees of the Company. The Company averred that the Notice merely stated the fact that the Claimant's employment with the Company had ended and does not contain any detrimental or harmful statements as to the cessation of the Claimant's employment and therefore cannot be said to have harmed the Claimant's future prospects.

[29] The Company contends and will contend that the termination of the Claimant was with just cause or excuse and prays that the Claimant's claim be dismissed.

THE LAW AND BURDEN OF PROOF

[30] The Claimant in the instant case has tendered his resignation as Senior Manager-Network Operations in the Company with effect from

25.11.2017. Nevertheless, the Claimant contended that he was forced to resign thus this being the crux of the matter in this case.

Specific jurisprudence: Forced Resignation

[31] In industrial jurisprudence forced resignation is tantamount to a dismissal in law, and arises where an employer, through compulsion or coercion, makes clear to an employee that he may either resign or be dismissed. In the case of *Stanley Ng Peng Hon v. AAf Pte Ltd* [1979] 1 MLJ 57, Choor Singh J held as follows:

> It will be clear that the underlying basis of the doctrine of "*forced resignation*" is the existence of facts showing that 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.

[32] In *Bata (M) Bhd v. Normadiah Bt Abu Suood* [1991] 2 ILR 1106, the learned Chairman of the Industrial Court Steve L.K. Shim (as he then was) held, *inter alia*, as follows:

> Now, industrial tribunals have consistently held that a "*forced resignation*" is a dismissal*: See Scott v. Formica Ltd [1975] IRLR 105; Spencer Jones v. Timmens Freeman [1974] IRLR 325.* It has also been held that the use of persuasion by an employer to obtain an employee's resignation may be a dismissal: see *Pascoe v. Hallen & Medway [1975] IRLR 116*. Again that a resignation will be treated as a dismissal if the employee is invited to resign and it is made clear to him that, unless he does so, he will be dismissed.

[33] In *City-Link Express (M) Sdn. Bhd. v. Greenson Dauk* [2002] 3 ILR 1219, the learned Chairman of the Industrial Court , Lim Heng Seng held, *inter alia*, as follows:

> **The underlying basis of the doctrine of *"forced resignation"* is the existence of facts showing that 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**. The recourse by an employer to non-coercive language and the existence of accompanying elements of persuasion, invitation, request or dictation are not of material significance so long as the employer had made it clear to the employee that he had no option but to tender his resignation or be dismissed *(Kuala Lumpur Glass Manufacturers Co Sdn. Bhd. v. Lee Poh Kheng [1995] 2 ILR 917).* The formulation of the words used by the employer or the nature of the pressure applied on the employee to leave are relevant in so far as they go to show that the employer has made it quite plain to the employee that he will be fired if he did not tender his resignation.
>
> [Emphasis added]

[34] If an employee is threatened that if he does not resign he will be dismissed, a consequent resignation will amount to a dismissal, but if his resignation is brought about by other factors, this is not a dismissal. This principle was laid down in the case of *Sheffield v. Oxford Controls Co. Ltd* [1979] ICR 396, [1979] IRLR 133, where Arnold J stated as follows:

> We find the principle to be one of causation. In cases such as that we have just hypothesised, and those reported, the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation letter or to be willing to give and to give the oral resignation. But where that willingness is brought about by other considerations and the actual causation of the resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him, then we think there is no room for the principle to be derived from the decided cases.

[35] Similarly, in *Harpers Trading (M) Sdn. Bhd, Butterworth v. Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan* [1988] 2 ILR 314 (Award No. 251 of 1998), the Industrial Court held:

> **It is a well-established principle of industrial law that if it is proved that an employer offered the employee the alternative 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 the 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]

[36] Put succinctly, therefore, what is key in any claim of forced resignation is the existence of an ultimatum, *to wit*, whether the employee was given the choice to either resign or be dismissed.

[37] The burden is upon the Claimant to show that he had been compelled against his will into resigning. See *Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor* [1998] 7 MLJ 359 and *Food Specialities (M) Sdn Bhd v Encik M Halim bin Manap@ AB Manaf* [1992] 2 ILR 311.

EVALUATION OF EVIDENCE AND FINDINGS OF COURT

Was there a contractual relationship between the Company and PP Auto?

[38] COW-2 testified that the business and operations of SSB and the Company were effectively aligned under the same contract with the Government, whereby SSB, as the concession holder, was contractually responsible for the provision and maintenance of saloon cars, and the

Company was operationally responsible for the maintenance of the said saloon cars. COW-2's testimony in this respect was as follows:

> "Q**:** Please explain regarding SSB and the Company?
>
> A: SSB is the concession holder, we have business with the Federal Government. Scope covers leasing/rental of saloon cars to the Federal Government and maintenance of these vehicles over each lease period. Lease period is 4-5 years. For business purposes, we split operational responsibilities to SSB for procurement and supply of saloon cars to the Government, and the Company (wholly owned subsidiary of SSB) is responsible for maintenance of saloon car 24 hours 7 days throughout the period of the lease. In a nutshell this is the core of business.
>
> Q: Why was the Maintenance division (Claimant's division) transferred from SSB to the Company?
>
> A: The master contract for entire contract with the Federal Government is under SSB (business decision). The maintenance of saloon cars put under Company much earlier in business (way back in 1990s). In initial stages everything packed under SSB. When started fine tuning related costs for servicing transferred and housed under Company."

[39] Indeed, it was further confirmed by COW-1 that the top management of both SSB and the Company were the same, including but not limited to himself, as Head of Human Resources and COW-2 as Chief Executive Officer.

[40] Based on evidence it is apparent that the Company had been in existence as early as 1999 wherein the Claimant was issued letters of confirmation and promotion from the Company [SOC- Appendix 1]. I find without hesitation that the Claimant had been under the employment of

the Company and he was involved in the maintenance and service of the vehicles.

[41] The Company's learned counsel was requested by the Court to submit a Suruhanjaya Syarikat Malaysia (SSM) Search Report to show that the Company is a wholly owned subsidiary of SSB. This document was given on 30.04.2019, ie after the close of hearing.

[42] The SSM Search Report of the Company dated 29.04.2019 showed that the Company was incorporated on 13.11.2015. This document contains a fact that was not pleaded by either party, nor was any evidence pertaining to the said fact attained by cross-examination of the Company's witnesses. The Claimant's learned counsel failed to adduce this evidence prior to the hearing, yet he tried to put forth in his submissions arguments based on this fact to support his contention that there could not be a contractual or business relationship between the Company and PP Auto. It is the considered opinion of this Court that the Claimant's submission is nothing more than a submission from the Bar. A submission from the Bar is abhorred by the Court as held in the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, where the Court of Appeal made it crystal clear about its position on evidence from the Bar:

> The only reference to the delay point is to be found in the address of counsel for the respondent in the court below and **the explanation is in reality that of counsel and not of his client under oath**. It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. **The practice of counsel giving evidence from the Bar, as was done in this case, is to be deprecated**.
>
> [Emphasis added]

[43] In the circumstances it is the considered view of this Court that the said submission by the Claimant's learned counsel is misleading and will be disregarded by the Court as it is clearly an afterthought and has no probative value as the fact of the Company's date of incorporation was not put forth during cross-examination of the Company's witnesses to allow them an opportunity to provide an explanation in respect thereto.

[44] As rightfully submitted by the Company's learned counsel that at no time prior to his written submissions did the Claimant dispute the relationship between PP Auto and the Company. On the contrary the Claimant's own witness CLW-1 had positively confirmed the said relationship and the Claimant had himself adduced a copy of the Company's letter dated 10.07.1995 appointing PP Auto as an ASC of the Company [CLB-1 p.4].

[45] The Claimant did not at any time challenge the existence of this relationship as testified to by COW-1 and COW-2 via cross-examination (or otherwise). Yet the Claimant submitted that COW-1 and COW-2 had concealed the said fact of the date of incorporation of the Company from this Court. It is axiomatic that a party cannot assault the credit of a witness on a matter upon which no explanation had been sought during cross-examination. This rule emanates from the seminal case of *Browne v. Dunne* (1894) 6 R 67, wherein the English Court of Appeal held as follows:

> […] it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a

> matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that **if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses**. […] All I am saying is that it will not do to impeach the credibility of a witness upon a matter which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.
>
> [Emphasis added]

[46] In my considered view it is the ruling of this Court that the said SSM Search Report dated 29.04.2019 is irrelevant to the matter before this Court as it contains facts that have not been pleaded before this Court, not subjected to examination before this Court, and was never tendered as a piece of evidence for the consideration of this Court during the hearing. It is trite that parties are bound by their pleadings and as such, it is clear that the Claimant's submission is a mere afterthought which does not warrant consideration by this Court and will be set aside by the Court. (See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 and *Ranjit Kaur S Gopal Singh v Hotel Excelsior [M] Sdn Bhd* [2010] 3 CLJ 310).

[47] Further the Claimant's attack on the credibility of COW-1 and COW-2 by stating that they had concealed the above details of the Company's incorporation from the Court is inappropriate, incongruous, misconceived and with ill intent as it is incumbent on the Claimant to put his entire case to the Company's witnesses. If he fails to do so, he has

no one else to blame but himself. He cannot seek solace by fighting out his case in his submissions devoid of any evidence adduced during cross-examination of the Company's witnesses.

[48] Moving on, the Claimant was subsequently transferred to the Company vide letter dated 01.01.2017. Following his transfer, the Claimant's position and responsibilities remained unchanged, and his division continued to deal directly with the ASCs, including PP Auto. It is undisputed that the Claimant had pleaded that he served in the Company for more than 23 years prior to his alleged termination.

[49] CLW-1 testified that PP Auto has been associated with the Company as PP Auto was the Company's ASC since 1995 [CLB-1 p.4]. CLW-1 confirmed that as an ASC, PP Auto has direct business dealings with the Company. The Claimant concurred with CLW-1's evidence.

[50] Furthermore, COW-1 confirmed that at all material times there was a maintenance contract between PP Auto and the Company. All this goes to show that there was a contractual and business relationship between the Company and PP Auto when PP Auto was appointed ASC of the Company, and the Claimant was at all material times under the employment of the Company.

Meeting on 25.11.2017 between the Claimant and senior management of Company

Aim and agenda of meeting

[51] It is undisputed that the Company conducted the RAMCI search on 23.11.2017 pursuant to the MACC letter dated 17.11.2017 as part of its internal investigation in response to the said MACC letter. Based on the said search it is undisputed that the Claimant and Syed Riaz were listed as directors and shareholders of PP Auto with effect from 04.01.2016. As a result of this, COW-2 requested for a meeting to be held with both the Claimant and Syed Riaz in the presence of senior management, namely Mr. Peter Lim, En. Irwan Iskandar Bin Ismail and COW-1.

[52] COW-1 confirmed that the purpose of the meeting on 25.11.2017 was to get clarification from the Claimant and Syed Riaz on the outcome of the RAMCI search, namely their response on their involvement as directors and shareholders in PP Auto. COW-1 testified that it was a fact finding unofficial meeting at the Managers' level and COW-2 wanted to first get clarification as it involved a possible conflict of interest situation. COW-1 affirmed in evidence that there was no mind-set to terminate the Claimant as he was just called in for clarification. The Claimant was given the opportunity to speak freely as affirmed by COW-1.

[53] COW-2 stated that he didn't see the need for an agenda to be given to the Claimant as at the beginning of the meeting the Claimant was given the MACC letter and asked to explain. COW-1 testified that he didn't demand an answer from the Claimant at that time, and if the Claimant needed time he could have asked for more time.

Claimant's response to his position as director and shareholder of PP Auto

[54] It is undisputed that the Claimant became a shareholder and director in PP Auto on 04.01.2016.

[55] However based on evidence there are two versions to the reasons why the Claimant became a shareholder and director in PP Auto. The Claimant alleged that the purpose he became a shareholder and director in PP Auto was to secure a PUNB loan to help CLW-1's husband to start a hardware business with his brother. This was confirmed by CLW-1 in her evidence.

[56] However, the Claimant painted a different picture during the meeting on 25.11.2017 wherein COW-2 stated as follows pertaining to the same:

> "Q: At the meeting, what happened?
>
> A: When I called meeting and everyone in meeting room, I tabled MACC letter and RAMCI search. Claimant at that point admitted he had applied for PUNB loan as had intention of going into hardware business. Claimant also mentioned that for him to apply for loan, a requirement of PUNB was that he needed to demonstrate a track record of business.
>
> So he approached PP Auto to make use of Company to submit application. He invited Syed Riaz to be a shareholder at same time.
>
> I confess I don't know whether it needs to be 100% bumiputera Company. Surprised PP Auto a long standing company would relinquish 100% control to Claimant and Syed Riaz to secure a loan.
>
> (Wong and family was out of ownership of Company for that period). I have to add Syed Riaz was stunned by revelation and

> he asked Claimant *"you tak keluarkan nama kita lagi".* Claimant's response *"loan belum selesai lagi".*
>
> We had not decided what action other than RAMCI search at that time. Thus explanation given by Claimant at that time."

[57] COW-2's evidence was corroborated by COW-1, namely that the Claimant wanted to apply for a PNUB loan to open a business of his own.

[58] So which version is the true reason for the Claimant's said involvement in PP Auto is baffling to this Court. But I do take cognizance of COW-2's comment that it is incredulous that CLW-1's husband and family, who are owners of PP Auto which is a long standing company, were willing to give up ownership of the said company to the Claimant for a substantial period of time if they are not to benefit from the said transaction.

[59] However, it is undisputed that the Claimant admitted that he was a director and shareholder of PP Auto with effect from 04.01.2016, wherein at that time he was in the employment of the Company.

[60] CLW-1 confirmed that upon rejection of the PUNB loan, the Claimant and Syed Riaz resigned from PP Auto on 04.01.2017. To support this contention, the Claimant submitted documents at CLB-1 p.15-18. However no evidence was tendered as to when these documents were lodged with SSM, as the Company's searches conducted by the Company on 23.11.2017 and 27.11.2017 indicated that both the Claimant and Syed Riaz were the directors and shareholders in PP Auto.

[61] COW-1 and COW-2 confirmed that the Claimant did not inform the meeting on 25.11.2017 that he had resigned as director and shareholder of PP Auto on 04.01.2017. Neither did he put forth the documents at CLB-1 p.15-18 pertaining to the same. In fact, COW-2 in evidence stated as follows:

> "….I have to add Syed Riaz was stunned by the revelation (that they were still the directors and shareholders of PP Auto) and he asked the Claimant "*You tak keluarkan nama kita lagi*". The Claimant's response "*Loan belum selesai lagi*".

[62] Thus this reiterated the fact that as at 25.11.2017 the Claimant and Syed Riaz had not resigned as directors and shareholders of PP Auto. Thus obviously the Claimant could not have informed the meeting on 25.11.2017 that he and Syed Riaz had resigned as director and shareholder of PP Auto at that point of time. This of course begs the question that if the Claimant had resigned on 04.01.2017 as director and shareholder of PP Auto, then why would he not inform COW-2 and all those present at the meeting on 25.11.2017 of this fact.

[63] In my considered view based on evidence the only undisputable conclusion is that the Claimant and Syed Riaz were directors and shareholders of PP Auto as at 25.11.2017.

Conflict of interest

[64] It is undisputed that whilst working in the Company the Claimant was a director and shareholder in PP Auto with effect from 04.01.2016 and at the material time the Company had direct business dealings with PP Auto. The extent of the Claimant's tenure as a director and

shareholder with PP Auto is allegedly for no less than one year although this fact is disputed by the Company.

[65] The Claimant admitted that he did not get the written permission of the Company to be a director and majority shareholder in PP Auto whilst he was working in the Company.

[66] It is undisputed that the Claimant's letter of employment with the Company dated 08.03.1994 expressly proscribes conflict of interest situations, whereby it states:

> "**13. Conflict of Interest**
> You shall not at any time during your service with the company, directly or indirectly, without the written consent of the company first obtained, engage or interest yourself whether for reward or gratuitously in any work or business other than in respect of your duties to the company."

[67] Further the Claimant's letter of promotion dated 18.01.2006 contained updated terms and conditions of employment, and likewise expressly prohibited conflicts of interest, stating:

> "**14. Conflict of Interest**
> You shall not at any time during the continuance of your employment hereunder except with the express permission of the Company, engage directly or indirectly in any other business or occupation either as principal, agent, servant, broker or otherwise or engage in any activity to the detriment, whether direct or indirect, of the Company's interests."
>
> [Emphasis added]

[68] The Claimant's submission that a conflict of interest can only arise "*if the employee is engaged in any activity to the detriment, whether*

direct or indirect, of the Company's interests" is misconceived as obviously Clause 14 above has 2 limbs the other being "*engage directly or indirectly in any other business or occupation either as principal, agent, servant, broker or otherwise".*

[69] In *Leong Peng Yoong & Ors. v. Venuganan Muniandy* [2007] 1 ILR 30, the Industrial Court held as follows in dealing with a conflict of interest situation involving a concurrent business:

> The due or faithful discharge of an employee's duty to his employer is the fundamental and paramount contribution by the employee in his employment for which he should not act inconsistent with the interests of the employer. **Running a company which has concurrent business with the employer entails clear conflict of interest which a faithful employee should avoid at all costs**.
>
> [Emphasis added]

[70] In *Jebsen & Jessen Eng (M) Sdn Bhd v. Lian Man Hoong* [2001] 1 ILR 771, the Industrial Court considered a situation where the dismissed employee was found to have an indirect interest in a vendor company. In concluding that a conflict of interest situation existed, and thereby dismissing the employee's claim, the learned Chairman of the Industrial Court held as follows:

> Hence, the imperative in conflict of interest situation is the obligation to make full disclosure from the very beginning, so that the employer and its top management is fully aware of the transactions by employees acting on behalf of the company. Actual losses need not be proved conclusively by way of evidence in conflict of interest situation, but possible detriment or loss to the employer is sufficient. **Conflict of interest or even possible conflict of interest and the duty to disclose is one of the mechanism of safeguards of the interest of the employer**.
>
> [Emphasis added]

[71] In *Pearce v. Foster* [1886] 17 QBD 536, Lord Esher MR observed:

> The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with the due and faithful discharge of his duty to his master, the latter has the right to dismiss. The relation of master and servant shall be in a position to perform his duty faithfully, and if by his own act he prevents himself from doing so, the latter may dismiss him.

See also *Faridatulazni Ibrahim v. Malaysian Airline System Berhad* (Award 300 of 2018).

[72] Turning to the instant facts, it is undisputed that the Claimant was a director and majority shareholder of PP Auto and that PP Auto had direct business dealings with the Company where the Claimant was Senior Manager-Network operations. It is also clear that the searches conducted by the Company through RAMCI and SSM reflected that the Claimant and Syed Riaz continued to be the sole directors and shareholders as at the time of search, and no documentary evidence to the contrary was adduced at the time of the Claimant's resignation. The Claimant had not disclosed the said facts to the Company and allowed his personal affairs to be in conflict with his duties and responsibilities towards the Company.

[73] The Claimant further submitted that he was merely acting as a passive director and shareholder in PP Auto to secure a PUNB loan, and thus on the authority *of Encik Soh Tong Hwa and Malaysian Oxygen Berhad* (Award No. 469 of 2008) the Claimant submitted that a passive shareholder or director would not give rise to any conflict of interest as an employee of another company. In the case of *Encik Soh Tong Hwa and Malaysian Oxygen Berhad (supra)*, Empire Gallery Sdn Bhd, of

which Mr. Soh was a director and shareholder, was not a business competitor of Malaysian Oxygen Berhad. The company search of Empire Gallery Sdn Bhd showed that its principal activity was property investment and provision of management and consultancy services. Whereas the principal activity of Malaysian Oxygen Berhad was the supply of industrial gases and related products. On the contrary, in the instant case, PP Auto has direct business dealings with the Company, and at all material times there was a maintenance contract between PP Auto and the Company. It is the considered view of this Court that the Claimant's submission that he was a passive director and shareholder does not hold water as he was the Senior Manager-Network Operation in the Company where maintenance of saloon cars leased by SSB under the concession agreement between the Government and SSB is carried out at ASCs such as PP Auto. Further as a director and majority shareholder in PP Auto he is responsible to carry out his statutory duties and responsibilities.

[74] Flowing from the above, it is the considered view of this Court that the Claimant had placed himself in a *prima facie* case of conflict of interest which is tantamount to a serious misconduct.

[75] Further, as a senior manager of the Company who had served the Company for over 23 years, the Claimant's contention that he was unaware of his duties and obligations as an employee of the Company is entirely unreasonable and untenable, more so as the Claimant was a senior manager at the material time. I agree with the Company's submission that the avoidance of conflict of interest is a fiduciary obligation incumbent upon all employees, and it does not lay upon the

Claimant to plead ignorance of such a basic obligation that is entrenched in an employer-employee relationship.

Claimant alleged that he was threatened with dismissal by COW-2 during the meeting on 25.11.2017

[76] The Claimant in evidence stated that he relied on a statement purportedly made by COW-2, i.e. that the Claimant could resign voluntarily or be pulled to Court. The Claimant testified that his understanding of the words "*pulled to Court*" is that he would be dismissed. In the considered opinion of this Court it is apparent that in this case the words "*pulled to Court*" referred to the disciplinary process of domestic inquiry that was indisputably afforded to Syed Riaz. The Claimant's perceived understanding of the said words is misconceived as the same does not in any way suggest a dismissal. Rather it is apparent that the Claimant would have been accorded the appropriate opportunities to present his defence and protest his innocence to the allegations preferred against him. Yet the said formal disciplinary process was vitiated by the Claimant's immediate resignation.

[77] However COW-2 denied in evidence that he had given the Claimant the said 2 options, namely resign voluntarily or be pulled to Court. In fact he reiterated that the said meeting was an informal fact finding meeting wherein the Claimant accepted full responsibility for what happened and said "*Biar saya letak jawatan*". COW-1 also confirmed that it was the Claimant who had verbally raised the suggestion of resignation during the meeting.

[78] The testimony of COW-2 vide his examination-in-chief was as follows:

> *"*Q6: At paragraph 6(h) of the Claimant's Statement of Case, he alleges that you had stated to him that he could quit voluntarily with immediate effect or be "pulled to the Court". How would you respond to this allegation?
>
> A**:** This is entirely untrue. Throughout the meeting, myself and the other members of the Company management in attendance had made it very clear that the Company intended to fully and thoroughly investigate the matter, especially because there could be serious negative consequences if there was a further MACC report against the Company, which could damage the prospects of renewing our contract with the Malaysian Government.
>
> At no time did I tell the Claimant that he would be "pulled to the Court" or that he only had those two choices. Indeed, it was the Claimant who acknowledged his responsibility for his actions, and then opted to tender his resignation."

[79] COW-1 similarly testified as follows in his examination-in-chief, as follows:

> "Q5: Please explain to this Honourable Court what happened during the meeting held on 25.11.2017?
>
> A: […] Based on the Claimant's own admissions and acknowledgements, **we then informed him that an internal investigation and/or domestic inquiry would be conducted in accordance with the Company's standard operating procedures, with the appropriate disciplinary action to follow**.
>
> **However, the Claimant then voluntarily tendered his resignation and had also claimed that Syed Riaz was not at fault and he would take full responsibility for his wrongdoing."**
>
> [Emphasis added]

[80] Notably, it was open to the Claimant to call (or if necessary, subpoena) any of the other attendees at the said meeting to corroborate his version of events, including Syed Riaz. He declined to do so. Suffice it to say, it is trite that the burden of proof lies on the Claimant to establish the fact of his dismissal.

[81] Even if the said words were allegedly made by COW-2 (which COW-2 denied in evidence), it is trite in industrial jurisprudence that the threat of disciplinary action cannot in any manner or form be construed as a dismissal. In *Foong Pek Foong v Tropicana Golf and country Resort Berhad* (Award No. 264 of 2018), the Industrial Court made the following observation:

> **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 guilt 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.
>
> [Emphasis added]

[82] Similarly, in *Mazli Mohamed v SAP Holdings Berhad* [2012] 1 ILR 399**)**, the Industrial Court propounded the view that the threat of disciplinary action did not amount to an implied dismissal, because there remained the appropriate opportunity for the employee to defend himself against any allegations of misconduct, whereby the burden would have been on the employer to adduce sufficient evidence to prove the misconduct before proceeding to dismiss. The Industrial Court stated the position as follows:

> […] even if the company proceeded to issue the claimant with the show cause the company would still have to unearth some evidence to prove that the misconduct committed by the claimant and it also has to go through a proper Domestic Inquiry. […] Alternatively, the court is of the finding that if the claimant is confident that he would be able to answer all the allegations there is no need for him to fear the threat allegedly uttered by COW6 or Hasnul.

[83] It is undeniable that disciplinary action in context does not mean summary dismissal, but rather that it would follow the proper procedural requirements, such as the issuance of a show cause letter and the convening of a domestic inquiry.

[84] Indeed, it is incontrovertibly apparent from the disciplinary proceedings initiated against Syed Riaz (who stood accused of the same acts of misconduct as the Claimant) that no immediate dismissal followed the meeting on 25.11.2017. In fact following the meeting on 25.11.2017, the Company had duly adhered to the requirements of procedural fairness and natural justice by issuing a show cause letter and convening a domestic inquiry and in pursuance thereof ultimately deciding to dismiss Syed Riaz [COE-1- COE-4].

[85] In the considered view of this Court there is no evidence to suggest that the Claimant was threatened with dismissal and given no option but to hand over his resignation letter following the meeting on 25.11.2017. Further there is no cogent evidence for the Claimant to assert that he would not to be afforded the right to similar disciplinary proceedings by the Company as that afforded to Syed Riaz, but instead be immediately dismissed.

Claimant's resignation letter

[86] It is undisputed that the Claimant had been free to leave after the meeting on 25.11.2017.

[87] The Claimant alleged that immediately after the said meeting finished at 2.00 pm he went to his room and prepared the resignation letter and the letter of handover of Company's properties. He allegedly handed over the said letters to COW-1 at 2.30pm.

[88] However, based on COW-1's testimony the Claimant left the office after the meeting. He returned at 4.00 pm and handed over the resignation letter and the handover letter to COW-1. COW-1 then gave the said letters to Mr. Peter Lim. After Mr. Peter Lim read the letters, COW-1 stamped acknowledgement on the said resignation letter. This in my considered opinion is a more plausible rendition of what happened as based on documents at COB-1 p. 16 and 18, the said documents were received by Mr. Peter Lim at 4.50pm on the same day.

[89] The Company accepted the Claimant's resignation vide letter dated 25.11.2017. Nevertheless, COW-1 affirmed that the Company

agreed to waive the 2 months' notice period or the two months' salary in lieu of notice as the Company had taken into account the Claimant's long service of 23 years with the Company.

[90] The Claimant admitted that he had himself prepared the resignation letter. There was no evidence of coercion or compulsion upon the Claimant to write the resignation letter and the Claimant had ample opportunity to ponder his decision as he did not submit the resignation letter immediately after the meeting. Clearly the Claimant has put thought to the letter and had written it on his own volition without any guidance.

[91] A simple perusal of the Claimant's resignation letter reveals no indication whatsoever that the Claimant was forced or coerced to resign. In fact it is one of politeness and decorum wherein there are no undertones of unhappiness, animosity or any tinge of being threatened into resignation. There was no evidence that he signed and submitted his resignation letter under protest. He did not qualify his resignation. On the contrary, the Claimant had expressly thanked the Company's management, whereby he had stated as follows:

> "*Saya mengucapkan jutaan terima kasih kepada pihak pengurusan Spanco telah menerima saya untuk bekerja di syarikat Spanco selama ini.*"

[92] I agree with the Company's submission that the Claimant's words as expressed in the said resignation letter are not the words of a man "*acting under duress*", and indeed positively indicates the contrary. The language chosen by the Claimant is one of respect and courtesy. In the said evaluation I have found guidance in the plethora of Industrial Court

decisions of which in the case of *Mazli Mohamed v. SAP Holdings Berhad(supra)*, the Industrial Court held as follows in evaluating a resignation letter purportedly obtained by force:

> Pertaining to the resignation letter (p. 26 of CBOD), the court has carefully perused it and **finds that the said letter absent of any nuances of unhappiness, dissatisfaction or bitterness**. Although, it may be argued that the claimant prepared it on the day the meeting was held but in his final paragraph he thanked the company for giving him the opportunity to work. Secondly, the court reiterates that the claimant decided to tender this letter to avoid any action being taken against him by the company. As such, **the court is unable to see this as the letter of a man who was involuntarily being forced to tender his resignation.**
>
> [Emphasis added]

[93] Likewise in *Malayan Banking Berhad v. Chan Hock Low* [2007] 4 ILR 203, the learned Chairlady of the Industrial Court made the following observation vis-à-vis a resignation letter prepared by the claimant:

> CLE11 is a polite, cordial letter, absent of any nuances of unhappiness, dissatisfaction or bitterness. There is no suggestion that CLE11 was pre-prepared for the claimant to sign. It is the claimant's own creation. In it, **the claimant thanks COW1 as well as all the staff and the Management team for "sixteen years of trust, training, guidance, support and cordial working relationship".** In his final paragraph, he had only good wishes for the company in the years ahead. Although he describes his resignation as "a very difficult decision", he goes on to say "fate has decided for me to move on in life". **The court has tried but is unable to see this as the letter of a man who was involuntarily being forced to tender his resignation.**
>
> [Emphasis added]

[94] In short as most succinctly stated in *Food Specialities (M) Sdn. Bhd. v. M. Halim bin Manap @ Abd. Manaf (supra)* as follows:

The contents of the letter of resignation are simple and straightforward and purposeful. There is no justification for this court to import words that are not in the letter.

[95] The Claimant in evidence stated that at the meeting on 25.11.2017 he was frightened and confused and that he was under duress to resign and felt ambushed. However the Claimant never wrote any letters to the Company to say that he was forced to resign or that he was ambushed. In this respect, the Industrial Court, in *Foong Pek Foong v. Tropicana Golf And Country Resort Berhad (supra)* observed as follows:

> **If the Claimant was forced to resign, the Claimant should have written to the Company to express so.** The Claimant has never raised the issue of forced resignation in writing or protest to the Company prior to making her representation to the Industrial Relations Department. […]
>
> […] The Claimant was being presumptuous and **by not writing to the Company to protest or complain on the alleged forced resignation, it became the "Achilles heel' of the Claimant's case**.
>
> [Emphasis added]

See also *S&P Food Industries (M) Bhd v. Suhana Abdul Wahab* (Award No. 2428 of 2007).

[96] It is thus the considered view of this Court that the Claimant had immediately at the meeting offered to resign when confronted with the MACC letter and the RAMCI search that confirmed his appointment as the director and shareholder of PP Auto. There was no necessity for the Claimant to resign immediately as there was no evidence that the Company had prejudged his guilt in the matter. In fact the Company was

willing for the matter to be investigated further through the disciplinary process of conducting a domestic inquiry as was done in the case of Syed Riaz. The fact that the Claimant resigned immediately when confronted with the said allegation lends credence to the Company's contention that the Claimant resigned not because he was forced to, but because he was seeking a way out of his dilemma which would be beneficial for him in the sense that he would not be subject to his perceived embarrassment and humiliation of going through the disciplinary process of a domestic inquiry, and the ensuing outcome at the end of the disciplinary process.

[97] In *Tai Khim Hoong v. Toling Corporation (M) Sdn Bhd* (Award 15 of 2019), the Industrial Court held as follows in dismissing a claim of forced resignation:

> In the general scheme of things, **it is not extraordinary for a Company to take disciplinary action in aggregation with their own internal inquires, when faced with undisciplined employees. Where however, the said suspected employee chooses to leave his employment immediately when faced with such circumstances and/or accusations, can it be said that he was coerced or inveigled into resigning**? […]
>
> […] Under the circumstances, the Claimant's allegations as to his situation immediately preceding his submission of the written resignation takes on rather an inexplicable hue in that this Courts finds it perplexing that **the prevailing consideration operating in the Claimant's mind was purely the avoidance of disciplinary action and embarrassment due to whatever his real and/or perceived fears were with regard to the potential domestic inquires/investigations; and not to the fact that he was totally innocent, as he claimed, of the implied and/or explicit charge made against him**; or to the fact that he had been a loyal employee of the Company for a considerable number of years and that this alleged

threat to his livelihood could and should be vigorously defended, come disciplinary action or not. To resign almost immediately when confronted with such an allegation, to my mind, lends credence to the Company's contention that the Claimant resigned not because he was forced to, but because he was looking for a way out of his predicament which was to his benefit, i.e. the avoidance of being subjected to potential embarrassment and/or humiliation and not because the Company had threatened to sack him if he refused to resign. The fact remains that the Claimant has admitted that notwithstanding he had not himself drafted the letter of resignation, he had requested COW 1 to do so; taken about 1/2 an hour to ruminate over it; and afterwards submitted the said letter to the Company on the very day in question; and that he had done so categorically to avoid the embarrassment and/or the humiliation of having to face disciplinary action. His claim, 6 days later, of forced resignation must indubitably then fall into the category of an 'afterthought'.

[Emphasis added]

[98] Indeed, in *Public Bank Bhd v. Othman Hashim & Ors* [2003] 3 ILR 971, the Industrial Court held as follows:

It is also the claimants' contention that looking at the situation at that time the choice of "resign or face disciplinary action", actually meant "resign or be dismissed". At the same time it would be naïve to think that giving the claimants the alternative to face disciplinary action would not necessarily lead to their dismissal as a precedent had been set and in view of the anonymous letter, the bank could not treat the matter differently for the claimant. The court however views that the claimants had a choice of either to resign or face disciplinary action. **If the claimants are confident that their actions does not constitute a serious misconduct that deserved the punishment of dismissal, they should then face the disciplinary action. If found guilty by the panel of Domestic Inquiry and dismissed, they can always challenge the dismissal in the Industrial Court. In this context the claimants cannot claim that they were given no choice but to resign because the ball was at their feet.**

[Emphasis added]

[99] As succinctly observed in *Chong Fook v. Tasek Corporation Berhad* (Award No. 800 of 2014):

> it is trite that the communication of the intention to hold formal investigations leading to a domestic inquiry; and of suspension from one's duties pending that process; can in no way amount to an inference of forced resignation.

[100] In my considered view it is illogical for the Claimant to buckle into resigning if he had committed no wrong in the first place. Flowing from the above, it is obvious that the Claimant had in fact tendered his resignation in response to the allegations of misconduct raised during the meeting on 25.11.2017, in order to avoid the impending disciplinary action which was to undoubtedly follow. The Company's actions of initiating the disciplinary process therefore is a *bona fide* exercise of its prerogative to discipline its employees.

[101] There is no contemporaneous evidence before this Court to lend credence to the Claimant's assertion of forced resignation; rather conversely, the Claimant's own resignation letter reflects his gratitude to the Company's management, which is wholly inconsistent with his claim of coercion and compulsion to resign.

[102] Having taken into consideration the evidence in its entirety, I find that the Claimant has failed to discharge the burden to prove that he was dismissed to a standard of a balance of probabilities.

[103] Such being the case it is the ruling of this Court that the factum of dismissal of the Claimant by the Company is absent. There does not appear to be any essential vitiating circumstances attending upon

the resignation of the Claimant. Accordingly, there is no onus whatsoever on the Company 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.

DECISION

[104] Taking into account the totality of evidence adduced by both parties and bearing in mind section 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, it is the considered finding of this Court that there was no unjust or wilful termination of the Claimant by the Company, as envisaged by the industrial jurisprudence pertinent to this issue. In brief, the Claimant's resignation is thus deemed to be voluntary. For the reasons above, this Court orders that this claim is hereby dismissed.

HANDED DOWN AND DATED 23 AUGUST 2019

~signed~

(SAROJINI A/P KANDASAMY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR